Docket for 03-9685

(9)

No. 03-9685
Title: Robert Johnson, Jr., Petitioner
v.
United States
Docketed: April 6, 2004
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (01-14830)
Decision Date: August 5, 2003
Rehearing Denied: December 22, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Mar 22 2004	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 6, 2004)
Apr 28 2004	Order extending time to file response to petition to and including June 7, 2004.
Apr 30 2004	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. VIDED.
May 28 2004	Order further extending time to file response to petition to and including July 2, 2004.
Jul 2 2004	Brief of respondent United States in opposition filed.
Jul 15 2004	DISTRIBUTED for Conference of September 27, 2004.
Sep 28 2004	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 12 2004	SET FOR ARGUMENT ON Tuesday, January 18, 2005.
Nov 12 2004	Brief of petitioner Robert Johnson, Jr. filed.
Nov 12 2004	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Nov 12 2004	Joint appendix filed.
Nov 24 2004	CIRCULATED.
Dec 17 2004	Brief of respondent United States filed. (Distributed)
Jan 10 2005	Reply of petitioner Robert Johnson, Jr. filed. (Distributed)
Jan 12 2005	Record received from U.S.C.A. 11th Circuit. (1 envelope)
Jan 18 2005	Argued. For petitioner: Courtland Reichman, Atlanta, Ga. For respondent: Dan Himmelfarb, Assistant to the Solicitor General, Department of Justice, Washington, D.C.
Jan 19 2005	Record received from the U.S.D.C. Middle Dist. of Georgia (1 envelope)

Supreme Court U.S.
FILED
MAR 2 2 2004
OFFICE OF THE CLERK

No. 04-9685

In the
Supreme Court of the United States

ROBERT JOHNSON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a federal court bases an enhanced sentence on a vacated state conviction, is the vacatur of the state conviction a "fact" supporting a prisoner's 28 U.S.C. § 2255 claim requiring reduction of the prisoner's sentence?

PARTIES TO PROCEEDING

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OPINIONS BELOW

The split panel opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 340 F.3d 1219 (11th Cir. 2003). (*See* Appendix filed concurrently herewith, at 7a). The Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's motion for rehearing *en banc* is reported at 353 F.3d 1328 (11th Cir. 2003). (*See* 13). The Order of the District Court denying Petitioner's Motion to Vacate under 28 U.S.C. § 2255 is not reported. (*See* 33a).

JURISDICTION

A divided panel of the court of appeals entered judgment on August 5, 2003. A petition for rehearing *en banc* was denied on December 22, 2003. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2255 ¶ 6(4) of Title twenty-eight of the United States Code provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--
>
> ...
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT OF THE CASE

Robert Johnson, Jr. ("Petitioner" or "Johnson") was sentenced as a career offender based on prior state convictions and received 188 months in federal prison. His career offender status enhanced his sentence by at least 51 months. Subsequently, a state court vacated the prior state convictions. Because Johnson no longer qualified as a career offender, he sought to vacate his enhanced federal sentence under 28 U.S.C. § 2255. The district court denied his petition as untimely, and a divided panel of the Eleventh Circuit affirmed. Johnson now seeks Certiorari.

A. Petitioner's Conviction and Direct Appeal

On March 18, 1994, a nineteen count indictment was returned against Johnson and five co-defendants, alleging, among other things, federal drug conspiracy charges. (8a; 37a). Johnson pled guilty to count two of the indictment. (Id.). On November 18, 1994, Johnson was sentenced as a career offender based on prior state court convictions and received 188 months. (Id.).

The 188-month sentence Johnson received was at the top end of the range for his offense level of 32 and criminal history category of 6. (27a-28a) (citing U.S.S.G. § 4B1.1(b) establishing a range of 151 to 188 months' imprisonment). Had he not received a career offender enhancement raising his offense level from 25 to 32, Johnson would have only qualified for 110 to 137 months' imprisonment. (27a) (citing U.S.S.G. Ch. 5, Pt. A). The career offender enhancement was based upon the district court's reliance on the facts of two prior state convictions: (1) a July 5, 1989 conviction for distribution of cocaine; and (2) a November 13, 1989 conviction for sale of cocaine. (27a). Johnson objected to

being classified as a career offender in the pre-sentence investigation report, but his counsel later withdrew that objection. (8a).

Following sentencing, Johnson filed a direct appeal in which he sought the vacation of his sentence on the grounds that the district court, in concluding that he was a career offender, considered prior state court convictions that were based on guilty pleas entered without a valid waiver of his constitutional rights. (8a; 47a). In affirming the sentence, the Eleventh Circuit declined to address the merits of Johnson's argument regarding the invalidity of his prior state convictions. However, the Eleventh Circuit stated as follows:

> We note in passing that, should appellant obtain at some future date the vacation of the state court conviction[s] in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide.

(Id. at n.2).

Johnson sought certiorari from this Court, but his petition was denied on April 22, 1996. (9a).

B. Petitioner's Attempts at Post-Conviction Relief

1. Federal Court

On April 25, 1997, Johnson filed a motion in the district court to extend the time to file a Section 2255 petition. (Id.) The district court determined that the motion was untimely but acknowledged that an event might transpire permitting Johnson to employ one of the later accrual dates under

§ 2255, so the court dismissed the motion without prejudice. (Id.).

2. State Court

Johnson filed a petition for a writ of habeas corpus in the Superior Court of Wayne County, Georgia, on February 6, 1998. (Id.). In that petition, he challenged certain of his prior state convictions on the ground that he had not validly waived his constitutional rights in those proceedings. (Id.). On October 24, 2000, over the objection of the State of Georgia, the Superior Court of Wayne County vacated Johnson's prior convictions as unconstitutionally obtained. (44a-45a).

3. Johnson's Return to Federal Court

On February 13, 2001, less than four months after the state court had vacated his prior convictions, Johnson filed the § 2255 motion that is the subject of this petition. (9a). Because Johnson no longer qualified as a career offender, he asked the court to vacate his enhanced sentence and to re-sentence him consistent with the appropriate offense level, i.e., minus the seven-level enhancement for career offenders with two prior felony convictions for a controlled substance offense. (9a; 25a-27a).

On August 1, 2001, the district court denied the § 2255 petition as untimely. (9a; 33a-35a). The Eleventh Circuit granted a certificate of appealability and appointed the undersigned firm to represent Johnson in the appeal. (9a).

C. The Court of Appeals' Split Decision

In a divided panel decision, the Eleventh Circuit affirmed the denial of Johnson's Section 2255 motion as untimely

because the motion was not brought within one year "from the date on which facts supporting the claim or claims presented could have been discovered . . ." under 28 U.S.C. § 2255 ¶ 6(4). (24a). The panel rejected Johnson's argument that the "fact" supporting his claim under 28 U.S.C. § 2255 was the fact that his prior state court convictions had been vacated, thus negating his status as a career offender. (Id.). The majority distinguished "factual" and "legal" events and concluded: "the vacatur of Appellant's prior state convictions is not a 'fact' from which the one-year statute of limitations may run" but rather a "court action obtained at the behest of a federal prisoner, not 'discovered' by him." (12a-13a). In so holding, the majority followed the view of the First Circuit in *Brackett v. United States*, 270 F.3d 60, 68 (1st Cir. 2001).

The dissent, on the other hand, followed the recent holding in *United States v. Gadsen*, 332 F.3d 224, 229 (4th Cir. 2003) (Wilkinson, J.), which concludes that state court vacatur of a prisoner's prior state convictions is a "fact" within the meaning of 28 U.S.C. § 2255 ¶ 6 (4). (25a) (Roney, J., dissenting) (*citing Gadsen*, 332 F.3d at 229). Like the Fourth Circuit, the dissent concluded that "fact" under 28 U.S.C. § 2255 ¶ 6(4) has its ordinary meaning: "a thing done." (26a) (citing, *inter alia*, *Webster's Third New International Dictionary* 813 (1993) (defining "fact," "1: a thing done")). Consistent with *Gadsen*, the dissent reasoned that the subsequent vacatur of Johnson's state convictions was "obviously new and not previously discoverable" until the state court actually overturned the prior convictions. (26a). And the fact of vacatur clearly supported Johnson's § 2255 claim because "only one of the two required convictions relied upon by the district court to enhance Johnson's sentence as a career offender was a valid conviction." (27a).

The Eleventh Circuit denied Johnson's petition for rehearing *en banc*. In dissenting from the denial, Judge Barkett reiterated the views of the Fourth Circuit in *Gadsen* and Judge Roney in his dissent from the panel opinion. Challenging the panel's distinction between "empirical" facts and "legal" facts, Judge Barkett reasoned there is "no metaphysical barrier [that] prevents a legal consequence from sometimes operating as a fact." (4a). In Judge Barkett's words, "the vacatur of Johnson's state court conviction is the operative fact that supports his claim, while a reduction in his sentence would be the possible 'legal effect or consequence' of that fact." (Id.).

REASONS FOR GRANTING THE WRIT

In *Custis v. United States*, 511 U.S. 485, 497 (1994), this Court held that federal prisoners cannot collaterally challenge state convictions used to enhance their federal sentences; however, should the convictions be vacated, the prisoner may "apply for reopening of any federal sentence enhanced by the state sentence."[1] Following *Custis*, nine circuits, including the Eleventh, have read *Custis* to mean that a federal prisoner successful in attacking his state court convictions may seek to reopen his federal sentence under 28 U.S.C. § 2255.[2] In

[1] Convictions obtained in violation of the right to counsel are the exception to the *Custis* rule: they may be collaterally attacked in federal court. *See id.* at 487.

[2] *See United States v. Doe*, 239 F.3d 473, 475 (2d Cir. 2001); *United States v. Walker*, 198 F. 3d 811, 814 (11th Cir. 1999); *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999); *United States v. La Valle*, 175 F.3d 1106, 1108 (9th Cir. 1999); *United States v. Pettiford*, 101 F.3d 199, 200-02 (1st Cir. 1996); *United States v. Bacon*, 94 F.3d 158, 161 n. 3 (4th Cir. 1996); *United States v. Cox*, 83 F.3d 336, 339-40 (10th Cir. 1996); *United States*

Daniels v. United States, 532 U.S. 374, 382 (2001), this Court reiterated the *Custis* framework: "If any such challenge to the underlying conviction is successful, the defendant may then apply for reopening of his federal sentence." *Id.* at 382. Accordingly, a prisoner's right to reopen an enhanced federal sentence is well-established; provided, of course, the prisoner first performs the extraordinary task of returning to the state system and obtaining vacatur of the predicate state court convictions.

Neither this Court nor Congress has yet addressed how the right to reopen an improperly enhanced federal sentence squares with the one year period of limitation imposed by the Antiterrrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This case presents that opportunity, as well as the opportunity to resolve the split between the circuits as to how to interpret 28 U.S.C. § 2255 ¶ 6(4) in this context. In amending 28 U.S.C. § 2255, AEDPA states:

> A 1-year period of limitations shall apply to a motion under this section. This limitations period shall run from the latest of --
>
> * * * * * *
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 ¶ 6(4).

v. Rogers, 45 F.3d 1141, 1143 (7th Cir. 1995); *United States v. Nichols*, 30 F.3d 35, 36 (5th Cir. 1994).

The dissent from the panel decision reasoned that the "fact[] supporting the claim" for reopening of Petitioner's federal sentence is the state court's vacatur of his predicate convictions, which could not have been discovered, indeed was not even a "fact," until it occurred in October 2000. (26a). Several courts, including the Fourth Circuit, have so held. *See United States v. Gadsen*, 332 F.3d 224, 227 (4th Cir. 2003) (Wilkinson, J); *United States v. Venson*, 295 F. Supp. 2d 630, 634 (E.D. Va. 2003); *United States v. Hicks*, 286 F. Supp. 2d 768, 770 (E.D. La. 2003); *United States v. Hoskie*, 144 F. Supp. 2d 108, 111 (D. Conn. 2001).

On the other hand, the panel held that the vacatur of predicate state convictions is not a "fact" supporting a § 2255 claim, but rather a "legal proposition." (12a-13a). In so holding, the panel followed the rationale of the First Circuit in *Brackett v. United States*, 270 F.3d 60, 68 (1st Cir. 2001). (13a) (citing *Brackett*, 270 F.3d at 68). By failing to give the word "facts" in § 2255 ¶ 6(4) its plain and ordinary meaning, the panel's interpretation is contrary to the basic rules of statutory construction. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992).

Given the frequency of this type of litigation, the instant conflict is likely to surface in other circuits, and this Court should clarify the appropriate reading of 28 U.S.C. § 2255 ¶ 6(4) as applied here. As the dissent stated:

> With this Court's decision and the decision in *Brackett v. United States*, 270 F.3d 60, 68 (1st Cir. 2001) (holding that "the operative date under § 2255(4) is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction"), there is a clear split in the circuits, which at some point should be resolved by Congress or the Supreme Court. Without question, if the rule announced in *Brackett* is consistently applied, in some circuits there will be defendants serving time in federal prison under a federal sentence based upon conviction of a state crime that the state court has authoritatively held the defendant unquestionably did not commit, who would be barred from relief, while in other circuits relief from such imprisonment will be readily available.

Accordingly, this Court should resolve the discrepant readings given to 28 U.S.C. § 2255 ¶ 6(4) to prevent the inconsistent application of a time bar to an otherwise meritorious motion under 28 U.S.C. § 2255.

The split among the various federal courts to address the issue makes it clear that courts are struggling to harmonize this Court's pronouncement in *Custis* and *Daniels* that petitioners may seek to reopen their federal sentences with AEDPA's modest one-year limitations period. This split of authority is affecting the fundamental rights of thousands of prisoners by imposing imprisonment for longer than authorized by the Constitution.

While a prisoner at the federal penitentiary in Estill, South Carolina has the right to present such a habeas petition, Johnson, housed across the border in Jesup, Georgia, is barred from seeking relief. Were Johnson able to present his petition, he would be resentenced minus his invalid state convictions and would have already served the appropriate sentence. As it stands now, he faces an additional five years in prison.

The divided panel's holding in this case is also inconsistent with AEDPA's interest in comity and federalism, two concerns which this Court has repeatedly asserted animate AEDPA. *See, e.g.*, *Woodford v. Garceau*, 538 U.S. 202 (2003); *Duncan v. Walker*, 533 U.S. 167 (2001); *Williams v. Taylor*, 529 U.S. 420 (2000). As pointed out by the dissent, the practical effect of the panel's ruling is to ignore the final and authoritative ruling of a Georgia court that the Petitioner's prior state convictions -- those which serve as the basis for his present federal incarceration -- are invalid. Such a result does not afford the proper respect for state court judgments required under this Court's jurisprudence.

In addition, the *Brackett* rule's overly formalistic and narrow reading of the word "facts" in § 2255 ¶ 6(4) greatly reduces the right this Court in *Custis* -- and nine circuits since -- have granted to prisoners to reopen federal sentences enhanced based on invalid state convictions. As a result, prisoners in the First and Eleventh Circuits are faced with the nearly impossible task of returning to state court and obtaining vacatur of their invalid state convictions within one year of their federal sentence becoming final, whereas their counterparts in the Fourth, and certain district courts within the Fifth and Second Circuits, can reopen their federal sentences whenever they actually obtain vacatur of their state convictions, even if that effort, as is common in some state systems, may take years.

The federal courts need guidance from this Court on how to apply 28 U.S.C. § 2255 ¶ 6(4) to *Custis* petitions seeking to reopen federal sentences based on overturned state convictions. Given the prevalence of enhanced federal sentences and challenges to prior state convictions, the issue presented here is surely to surface with some frequency. So

that the law will be clear on this important issue, Petitioner respectfully requests that this Court grant a writ of certiorari in this case.

1. THE CIRCUITS AND LOWER FEDERAL COURTS ARE SPLIT ON THE APPLICATION OF 28 U.S.C. § 2255 ¶ 6(4) IN THIS CONTEXT

In the First and Eleventh Circuits, the vacatur of a predicate state court conviction is not a "fact" supporting a § 2255 claim for reopening a federal sentence enhanced based on the vacated state conviction. (13a); *Brackett*, 270 F.3d at 68. In the Fourth Circuit, and certain district courts within the Fifth and Second Circuits, such vacatur is a "fact" supporting a claim for resentencing under § 2255. *See Gadsen*, 332 F.3d at 229; *Hicks*, 286 F. Supp. 2d at 770; *Hoskie*, 144 F. Supp. 2d at 111. The Fourth Circuit's view affords the term "facts" as employed in § 2255 ¶ 6(4) its plain and ordinary meaning; the view of the First and Eleventh Circuit does not, resulting in confusion among the federal courts as to how to correctly interpret the statutory provision.

It is well-settled that courts must give words their ordinary meaning. *See, e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). As stated in the dissent to the denial of the petition for rehearing *en banc*, "[t]he ordinary meaning of 'fact' refers to 'a thing done' that can be 'known with certainty.'" (3a) (citing *Webster's Third New International Dictionary* 813 (1993) (defining "fact," "1: a thing done"); *The American Heritage Dictionary of the English Language* 46 (1975) (defining "fact," "1. something known with certainty"); *Black's Law*

Dictionary 738 (3d ed. 1933) (defining "fact," "1-a thing done").

The Eleventh Circuit's holding in this case conflicts with the above well-settled rule of statutory construction. According to the Eleventh Circuit, the "facts" referred to by § 2255 ¶ 6(4) do not refer to things done, but rather to "empirical" facts "capable in principle of falsification." (12a). In the divided panel's view, "the vacatur of prior state convictions is a court action obtained at the behest of a federal prisoner, not 'discovered' by him." (13a) (citing *Brackett*, 270 F.3d at 68). Applying its "common sense distinction between the factual and legal to § 2255 ¶ 6(4)," the split panel concluded the "vacatur of Appellant's prior state convictions is not a fact from which the one-year statute of limitations may run." (13a).

As explained by Judge Wilkinson in *Gadsen*, however, such reasoning is flawed and contrary to the basic rules of statutory construction. Speaking for a unanimous panel of the Fourth Circuit Court of Appeals, Judge Wilkinson wrote:

> The plain text of § 2255 and the logic of the Supreme Court's opinion in *Daniels* point to the same conclusion: in cases like Gadsen's, the federal statute of limitations begins running when the state court conviction is conclusively invalidated.

Gadsen, 332 F.3d at 228-299.

The Fourth Circuit further refuted the First Circuit's rationale as follows:

> We are less concerned than the First Circuit about the fact that § 2255 refers to the "discover[y]" of "facts" rather than specifically to the issuance of a state court opinion. *See Brackett*, 270 F.3d at 68. Section 2255(4) is not limited to the vacatur of a state court conviction; it potentially encompasses a wide range of subsequently-discovered facts. The use of a general categorical term ("facts") to refer to the spectrum of specific examples of that category (the universe of potential factual predicates for a § 2255 challenge) is an ordinary technique in the drafting of statutes.

Id. at 224 n.2.

Thus, contrary to the logic of the First and Eleventh Circuits, there is nothing about the term "facts" in § 2255 ¶ 6(4) that mandates an "empirical" definition of the term. As held by the Fourth Circuit in *Gadsen*, and counseled by Judge Roney, the term "facts" was not designed to exclude facts of legal significance, such as the reversal of predicate convictions, in favor of non-legal or "empirical" facts. Rather, as the Fourth Circuit concluded, "facts" as used in Section ¶ 6(4) is a generic term designed to capture any potential basis for a § 2255 claim. The panel's overly narrow reading of "facts" is contrary to § 2255's plain terms and the rules of statutory construction.

Moreover, to complete the statutory analysis, it is beyond debate that the vacatur of Johnson's prior state convictions "supports the claim or claims presented." When Johnson was sentenced in federal court, the district court relied on two prior state convictions to boost Johnson into the career offender category, thus raising his offense level from 25 to 32. (27a). This seven level enhancement raised his sentence range from 110 to 137 months to the enhanced range (based on his career offender status) of 151 to 188 months. (Id.)

Johnson was sentenced to the top of the enhanced range: 188 months. Now that his state court convictions have been vacated, however, Johnson no longer qualifies as a career offender or for the enhanced sentence he is currently serving. (Id.). As such, the state court's subsequent vacatur of his prior convictions relied on by the federal sentencing court clearly "supports the claim or claims presented" by the instant § 2255 motion seeking reopening of his inappropriately enhanced federal sentence.

Given the prevalence of enhanced federal sentences and subsequent state court challenges to predicate state court convictions, this issue is likely to present itself with some frequency in the federal courts. *See, e.g., Brackett v. United States*, 206 F. Supp. 2d 183, 186 (D. Mass. 2002) (discussing frequency of similar petitions). Indeed, even within the Eleventh Circuit, a similar appeal involving the same issue under § 2255 ¶ 6(4) was docketed prior to the decision in the instant case. *See Rivers v. United States*, No. 03-11734-A (11th Cir. Apr. 8, 2003). In light of the conflict among certain circuits and lower federal courts about how to apply § 2255 ¶ 6(4) in this context, and given the frequency with which the issue may arise affecting the rights of scores of federal defendants, this Court should grant certiorari to resolve the matter.

II. THE ELEVENTH CIRCUIT'S RULE IS CONTRARY TO AEDPA'S INTEREST IN COMITY AND FEDERALISM

This Court has repeatedly asserted that AEDPA is designed to further principles of comity, finality, and federalism. *See, e.g., Woodford v. Garceau*, 538 U.S. 202 (2003), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Duncan v. Walker*, 533 U.S. 167 (2001). Here, the panel's rule is

contrary to the principles of comity and federalism, because the panel's decision fails to honor the state court's conclusive and final judgment that Petitioner's prior state convictions are invalid.

As Judge Barkett stated in her dissent to the denial of the petition for rehearing *en banc*:

> [I]n this case, the federal court poses no risk of disrupting the finality of a state action. The state itself has decided to vacate the conviction. The Supreme Court has stated that in the federal habeas context a federal court should not "deprive [a] state-court judgment of its normal force and effect." *Daniels*, 532 U.S. at 378, 121 S.Ct. 1578. This is exactly what the panel-majority does by stripping the state court of the ability to exculpate criminal defendants.

(5a-6a). Should the panel rule be allowed to stand, the judgment of the Wayne County Superior Court that Petitioner's prior state convictions are unconstitutional will be denied its normal force and effect.

This result is contrary to the jurisprudence of this Court, which has previously emphasized the importance of federal courts honoring state court judgments consistent with the aims of federalism and comity. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000) ("Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. . . .[W]e have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings."); *see also Coleman v. Thompson*, 501 U.S. 722, 726 (1991) ("This is a case about

federalism. It concerns the respect that federal courts owe the States and the States' procedural rules . . . .").

Here, it is undisputed that Johnson followed the applicable state procedural rules in obtaining the vacatur of his prior state convictions. It is also undisputed that the state court conclusively invalidated those prior convictions as unconstitutionally obtained. Having complied with the state process in successfully attacking his predicate convictions, as well as this Court's pronouncement in *Custis* that he should seek relief from the state court system, the panel rule would ignore the effect of that hard won state court judgment and deny the Petitioner the right to present his § 2255 petition based on that judgment. Such a result is inconsistent with the interests of comity and federalism that this Court's jurisprudence has recognized with regard to AEDPA.

III. THE PANEL'S RULE UNFAIRLY CONSTRICTS THE RIGHT TO REOPEN IMPROPERLY ENHANCED FEDERAL SENTENCES UNDER *CUSTIS*

Beginning with *Custis*, this Court established a framework in which federal prisoners seeking to challenge state convictions used to enhance their federal sentences were routed first to state court. In the rare event they were successful in such challenges, this Court acknowledged that they could return to federal court and apply for reopening of any federal sentence enhanced by the vacated state conviction. *See Custis*, 511 U.S. at 497. This Court confirmed that procedure, post-AEDPA, in *Daniels*: "If any such challenge to the underlying conviction is successful, the defendant may then apply for reopening of his federal sentence." 532 U.S. at 382.

Since this Court's pronouncement in *Custis*, nine federal courts of appeals -- all those to have considered the issue -- have allowed (or indicated they would allow) federal defendants to employ § 2255 to seek reopening of their improperly enhanced federal sentences. *See* note 1, supra. Thus, the well-established rule post-*Custis* is that defendants who are in custody pursuant to an improperly enhanced federal sentence can seek resentencing in federal court under 28 U.S.C. § 2255.

The panel's rule unfairly restricts the well-recognized right to reopen improperly enhanced federal sentences under § 2255 by compacting all of the necessary action into a one year time frame under § 2255 ¶ 6(4). As even the First Circuit conceded in *Brackett*, such a framework places a nearly impossible burden on defendants:

> ... the net result of *Custis* and *Daniels* was to leave federal prisoners in a practical bind. They could not bring a § 2255 petition to federal court until they had gotten the state court convictions vacated and [under the *Brackett* Court's view of § 2255 ¶6(4)] they had only one year in which to accomplish that from the date of the federal conviction -- a daunting task.

270 F.3d at 67. Given that the average state challenge takes more than one year to adjudicate -- Petitioner's state habeas petition remained pending for over 32 months -- the panel's rule unduly constrains, if not practically eliminates, the right to reopen federal sentences enhanced based on unconstitutional state convictions.

As explained by the Fourth Circuit in *Gadsen*, "the entire point of *Custis* and *Daniels* was that litigants should not bypass state courts to litigate the facts underlying their state

convictions during challenges to a federal sentencing determination." 332 F.3d at 228. Adopting the panel -- and *Brackett* -- rule is equivalent to punishing litigants like Johnson "for having faithfully followed these instructions." *Id.*[3]

Indeed, as Judge Barkett pointed out in her dissent to the denial of the petition for rehearing *en banc*, Johnson followed the instructions of this Court, the direct instructions of the Eleventh Circuit, the proper instructions of the state, and was able to have his state convictions timely vacated. (6a). Now, having done so, he is unfairly being denied his right to present his habeas petition. As the Fourth Circuit stated in *Gadsen*: "[i]t would be an illogical, if not cruel, gesture for the Supreme Court to invite prisoners to attack their predicate convictions and then inform them their efforts must go for naught and their enhanced sentences must stand." (citation and internal quotations omitted).

This Court should grant certiorari to clarify the law, which in some circuits threatens to undermine defendants' right to set aside their improperly enhanced federal sentences under § 2255. Such a result is contrary to this Court's decisions in *Custis* and *Daniels* and the protections afforded by the writ of habeas corpus.

[3] This is particularly true in Johnson's case, as a panel of the Eleventh Circuit specifically stated that should Johnson successfully attack his state convictions, he could seek to reopen his federal sentence under 28 U.S.C. § 2255. (47a) ("We note in passing that, should Johnson obtain at some future date the vacation of the state court conviction[s] in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide.").

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that this Court grant a writ of certiorari in this case.

This 22nd day of March, 2004.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 01-14830
D.C. Docket NO. 01-00014-CV-WDO-7

[Filed December 22, 2003]

ROBERT JOHNSON, JR.,	)
Petitioner-Appellant,	)
	)
versus	)
	)
UNITED STATES OF AMERICA,	)
Respondent-Appellee.	)
	)

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION FOR REHEARING EN BANC

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges.

ORDER:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges

who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Rehearing En Banc is DENIED.

/s/ J.L. Edmondson
CHIEF JUDGE

BARKETT, Circuit Judge, dissenting from the denial of rehearing en banc:

I believe the issue in this case merits en banc consideration. The panel-majority holds that when a federal court bases an enhanced sentence on a state conviction, the subsequent state vacatur of that very same conviction is not a fact supporting a prisoner's habeas claim that his sentence should be reduced accordingly. I do not believe the panel-majority's statutory interpretation of 28 U.S.C. § 2255 ¶ 6(4) (2003) is supported by law or logic. On the contrary, I believe that Judge Roney's dissent and Judge Wilkinson's opinion for the Fourth Circuit[1] correctly explicate the relevant law.

It is axiomatic that courts must give words their ordinary meaning. *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) ("Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said."). The ordinary meaning of "fact" refers to "a thing done" that can be "known with certainty."[2] In this case, the vacatur of state conviction is a fact because it is something that actually occurred and can be proven in support of Johnson's claim. However, the panel-majority concludes that a vacatur cannot be a fact because it comes from an authoritative legal source.

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[1] United States v. Gadsen, 332 F.3d 224 (4th Cir. 2003).

[2] See Webster's Third New International Dictionary 813 (1993) (defining 'fact,' '1: a thing done'); The American Heritage Dictionary of the English Language 46 (1975) (defining 'fact,' '1. something known with certainty'); Black's Law Dictionary 738 (3d ed.1933) (defining 'fact,' '1-a thing done').

Although distinctions are often made between the facts and the legal consequences of a case,[3] no metaphysical barrier prevents a legal consequence from sometimes operating as a fact. With regard to Johnson's federal habeas claim, the vacatur of his state court conviction is the operative fact that supports his claim, while a reduction in his sentence would be the possible "legal effect or consequence" of that fact.

The panel-majority suggests that the underlying state Gideon violations-and not the state vacaturs-are the facts that support Johnson's habeas claim. Simultaneously, the panel-majority asserts that the underlying constitutional claims would not have been sufficient to support a federal habeas claim, acknowledging that "[t]he entire point of Custis [v. United States, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994)] and Daniels [v. United States, 532 U.S. 374, 382, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001)] was that litigants should not bypass state courts to litigate the facts underlying their state convictions during challenges to a federal sentencing determination." Johnson v. United States, 340 F.3d 1219, 1225 (11th Cir. 2003). Thus, the panel-majority paradoxically asserts that federal courts are not the proper forum for litigating facts underlying a state conviction, but these very same facts can trigger the statute of limitations for federal habeas review.

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[3] See Webster's Third New International Dictionary 813 (1993) (defining "fact" as: "6 usu pl a: any of the circumstances of a case at law as it exists or is alleged to exist in reality: something proved by the evidence to be or alleged to be of actual occurrence b: the reality or events or things the actual occurrence or existence of which is to be determined by evidence."); American Heritage College Dictionary (1982) (defining "fact" as "the aspect of a case at law, comprising events determined by evidence as distinguished from interpretation of law: The jury made a finding of fact.").

The panel-majority also supports its interpretation by arguing that it promotes AEDPA's goal of finality. But that is not AEDPA's only goal. The Supreme Court has continually asserted that AEDPA is designed "to further the principles of comity, finality, and federalism." See, e.g., Woodford v. Garceau, 538 U.S. 202, 123 S. Ct. 1398, 1401, 155 L. Ed. 2d 363 (2003); Duncan v. Walker, 533 U.S. 167, 178, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001); Williams v. Taylor, 529 U.S. 420, 436, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000). Often decisions will simultaneously promote all three of these principles. In many instances, the Supreme Court has extolled the virtues of finality because of its relation to comity.[4] However, in this case, the federal court poses no risk of disrupting the finality of a state action. The state itself has decided to vacate the conviction. The Supreme Court has

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[4] See, e.g., Williams v. Taylor, 529 U.S. 420, 436, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) ("AEDPA's purpose to further the principles of comity, finality, and federalism . . . Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings."); Coleman v. Thompson, 501 U.S. 722, 726, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus"); McCleskey v. Zant, 499 U.S. 467, 493, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991) ("The doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments.").

stated that in the habeas context a federal court should not "deprive [a] state-court judgment of its normal force and effect." Daniels, 532 U.S. 374, 378, 121 S. Ct. 1578, 149 L. Ed. 2d 590. This is exactly what the panel-majority does by stripping the state court of the ability to exculpate criminal defendants.

In summary, I believe that this particular litigant, who followed the instructions of the Supreme Court,[5] who followed the direct instructions of this Court,[6] who followed the proper instructions of the state and was able to have his state convictions timely vacated, and who probably relied on the plain language of § 2255 ¶ 6(4), is unfairly being denied his right to present his habeas petition.

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[5] The Supreme Court has explicitly instructed prisoners to attack their convictions in state court. Daniels, 532 U.S. at 382 ("After an enhanced federal sentence has been imposed . . ., the person sentenced may pursue any channels of direct or collateral review still available to challenge his prior conviction."); Custis, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (stating that a prisoner who was still in custody on his prior convictions could "attack his state sentences [in state court] or through federal habeas review").

[6] In this case, the result is even more cruel and unfair, since this Court has previously instructed this Appellant to do precisely what he has done. In a prior opinion affirming Johnson's sentence, we included the following caveat in a footnote: "We note in passing that, should Johnson obtain at some future date the vacation of the state court convictions in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide." United States v. Johnson, No. 94-9402, 73 F.3d 1108 (11th Cir. 1995).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 01-14830
D.C. Docket No. 01-00014-CV-WDO-7

[Filed August 5, 2003]

ROBERT JOHNSON, JR.,	)
Petitioner-Appellant,	)
	)
versus	)
	)
UNITED STATES OF AMERICA,	)
Respondent-Appellee.	)
	)

Appeal from the United States District Court
for the Middle District of Georgia

Before BLACK, RONEY and STAPLETON*, Circuit Judges.

BLACK, Circuit Judge:

This case allows us to clarify the time limits in cases where career offenders indirectly attack their federal

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* Honorable Walter K. Stapleton, United States Circuit Judge for the Third Circuit, sitting by designation.

sentences by first collaterally attacking their prior state convictions. Federal prisoner Robert Johnson brought such an indirect attack on his federal sentence, and he now appeals the district court's denial of his § 2255 petition as untimely. We issued a certificate of appealability on the following question:

> Whether the district court correctly determined that appellant's motion to vacate, filed pursuant to 28 U.S.C. § 2255, was untimely under the one-year statute of limitations provision in the Antiterrorism and Effective Death Penalty Act of 1996.

We now conclude Appellant's indirect attack on his federal sentence was untimely, and we therefore affirm.

I. BACKGROUND

Between 1983 and 1994, Appellant pled guilty to several state criminal charges. In 1994, he was indicted as one of five co-defendants on federal drug conspiracy charges, and he pled guilty. A pre-sentence investigation report recommended classifying him as a career offender based on his prior state convictions. Initially, Appellant objected to being classed as a career offender without explaining the basis for his objection. At his sentencing hearing, however, counsel for Appellant advised the district court that Appellant wished to waive all of his objections to the pre-sentence investigation report. Appellant was sentenced as a career offender and received 188 months' imprisonment. Appellant then filed a direct appeal, contending his prior state convictions were obtained in violation of his constitutional right to counsel, and he therefore should not have been sentenced as a career offender. On December 22, 1995, we affirmed Appellant's sentence. Our unpublished order included the following caveat in a footnote: "We note in passing that, should

appellant obtain at some future date the vacation of the state court convictions in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide." *United States v. Johnson*, 73 F.3d 1108, No. 94-9402 (11th Cir. 1995). Appellant sought certiorari from the Supreme Court of the United States, but the Supreme Court denied his petition on April 22, 1996. *Johnson v. United States*, 517 U.S. 1162, 116 S. Ct. 1559, 134 L. Ed. 2d 659 (April 22, 1996) (mem.).

Just over one year later, on April 25, 1997, Appellant filed a motion in the district court to extend the time to file a § 2255 petition. The district court ruled that Appellant's motion was untimely under § 2255 ¶ 6(1). The district court did acknowledge the possibility that exists in every habeas case, namely, that something might transpire that would permit Appellant to take advantage of one of the later accrual dates under § 2255 ¶ 6. It therefore denied Appellant's motion without prejudice.

On February 6, 1998, Appellant filed a state habeas petition challenging all of his prior state convictions on the ground that he had not validly waived his right to counsel in those proceedings. On October 24, 2000, the state court vacated Appellant's prior convictions. Appellant then filed the present § 2255 petition on February 13, 2001, asking the district court to vacate his sentence because he no longer qualified as a career offender. On August 1, 2001, the district court denied the § 2255 petition as untimely. We granted a certificate of appealability, and this appeal followed.[1]

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[1] We subsequently appointed counsel to represent Appellant for this appeal.

II. DISCUSSION

As this case involves an indirect challenge to a federal sentence via a collateral attack on prior state convictions, some background on the law of such challenges is helpful.

First, in *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), the Supreme Court held that, during his sentencing proceeding, a federal prisoner could not attack the validity of his prior convictions that raised his maximum sentence under the Armed Career Criminal Act, 18 U.S.C. § 924 (e); the only exception to this rule is for prior convictions based on a deprivation of the right to counsel under *Gideon v. Wainwright*. *See Custis*, 511 U.S. at 496; 114 S. Ct. at 1738.

Second, federal prisoners generally cannot attack prior convictions which enhanced their federal sentences in a § 2255 proceeding challenging the validity of their federal sentence. *Daniels v. United States*, 532 U.S. 374, 376, 121 S. Ct. 1578, 1580, 149 L. Ed. 2d 590 (2001); *see also Lackawanna County District Attorney v. Cross*, 532 U.S. 394, 403-04, 121 S. Ct. 1567, 1574, 149 L. Ed. 2d 608 (2001) (reaching same conclusion for § 2254). If a prior conviction used to enhance a federal sentence is no longer itself open to direct or collateral attack, the defendant is generally without recourse. *Daniels*, 532 U.S. at 382, 121 S. Ct. at 1583.

Following *Custis*, many Circuits including our own have authorized indirect attacks on federal sentences; a defendant may seek to reopen his federal sentencing pursuant to § 2255 if he has successfully attacked a prior state conviction used to enhance his federal sentence. *United States v. Walker*, 198 F.3d 811, 813 (11th Cir. 1999) (per curiam) (citing cases). The effect of these rules has been to redirect challenges to

federal sentences from federal courts to state courts, where court records may have been destroyed and where state executive officials often have no interest in defending a conviction for which the defendant has already served his sentence.

With this background in mind, we turn to Appellant's arguments on appeal.

A. Statute of Limitations

Appellant first argues his § 2255 petition, filed February 13, 2001, was timely under 28 U.S.C. § 2255 ¶ 6(4). That section provides as follows:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> . . . .
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 ¶ 6. Appellant's argument is straightforward: the single "fact" supporting the claim in his § 2255 petition is the vacatur of his prior state convictions; absent those state convictions, Appellant should not have been sentenced as a career offender, and his federal sentence should be vacated. Appellant contends the "fact" supporting his § 2255 claim—the vacatur of his prior state convictions—could not have been discovered until October 24, 2000, the date on which the state court entered its order. He therefore reasons his § 2255 petition, filed on

February 13, 2001, was within one year of October 24, 2000, and thus within the AEDPA statute of limitations.

The question we must answer is whether the vacatur of a state conviction constitutes a "fact" within the meaning of § 2255 ¶ 6(4). Ordinarily, a federal prisoner must file his § 2255 petition within one year of the date on which his judgment of conviction becomes final.[2] Because an indirect collateral attack is predicated on a successful challenge to prior state convictions used to enhance the federal sentence, it is at least plausible to argue that a petitioner has one year from the date his prior state convictions were set aside, under § 2255 ¶ 6(4).

Common sense, however, dictates that we distinguish legal propositions and results from the "facts" referred to in § 2255. A factual proposition is typically something capable in principle of falsification (or possibly even verification) by some empirical inquiry, while a legal proposition is identified by consulting some authoritative legal source. If we are asked whether Appellant's prior state convictions have been vacated, we would consult an authoritative legal source: the records of decisions of the state court where Appellant collaterally attacked those convictions. On the other hand, if we are asked whether Appellant waived his right to counsel before pleading guilty to the state charges, we would need to make an empirical inquiry into the matter, for example by

[2] AEDPA's statute of limitations applies somewhat differently to a petitioner, like Appellant, whose conviction became final prior to the effective date of AEDPA. Like all other circuits to have considered the issue, we allow such petitioners a one-year grace period until April 23, 1997, to file a § 2255 petition. *See Goodman v. United States*, 151 F.3d 1335, 1337 (11th Cir. 1998).

reading the extant records of Appellant's plea hearings.[3] Put another way, the vacatur of prior state convictions is a court action obtained at the behest of a federal prisoner, not "discovered" by him. *Brackett v. United States*, 270 F.3d 60, 68 (1st Cir. 2001). Applying the common sense distinction between the factual and the legal to § 2255 ¶ 6(4), we conclude the vacatur of Appellant's prior state convictions is not a "fact" from which the one-year statute of limitations may run.

This common sense reading of the phrase "facts supporting the claim or claims" is bolstered by comparing that accrual date with the other accrual dates in § 2255. Section 2255 ¶ 6(1) refers to the date a judgment becomes final, and § 2255 ¶ 6(3) refers to the date a right was initially recognized by the Supreme Court. The use of the term "facts" in § 2255 ¶ 6(4) is in contrast to those other subsection's use of "judgments" and "rights," two legal results distinct from historical facts. *See Brackett*, 270 F.3d at 68-69. It follows that the state court's vacatur of Appellant's prior convictions is not a "fact" within the meaning of § 2255 ¶ 6(4).

The interpretation of § 2255 ¶ 6(4) urged by Appellant is also inconsistent with the parallel habeas provision that applies to state prisoners, § 2244(d)(1). Under § 2244(d)(1)(D), the one-year limitation period runs from

[3] Of course, the passage of time may make an empirical inquiry difficult or impossible. *See Lackawanna County*, 532 U.S. at 403, 121 S. Ct. at 1574 ("As time passes, and certainly once a state sentence has been served to completion, the likelihood that trial records will be retained by the local courts and will be accessible for review diminishes substantially."). The possible harm from delay further bolsters our narrower interpretation of AEDPA's statute of limitations.

"the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Were we to adopt Appellant's interpretation of § 2255 and apply it to the parallel provision in § 2244, we would render redundant the word "factual" in § 2244, because all such predicates would be functionally "factual" in nature.

Others of our sister Circuits have interpreted "factual predicate" in § 2244 to mean historical facts, not court rulings or legal consequences. *See Hasan v. Galaza*, 254 F.3d 1150, 1154 & n.3 (9th Cir. 2001); *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000); *Ybanez v. Johnson*, 204 F.3d 645, 646 (5th Cir. 2000)(per curiam) (characterizing as an "extraordinary proposition" the argument that "the factual predicate of their claim consists neither of evidence nor events that happened at trial but in the state court's ruling on their constitutional claims"). As the Supreme Court commonly interprets § 2254 and § 2255 in light of each other, *see Lackawanna County*, 532 U.S. at 402, 121 S. Ct. at 1573, we interpret the limitations period of § 2255 consistently with the limitations period of § 2244. *See Brackett*, 270 F.3d at 69 ("Because § 2254 (habeas corpus from state convictions) and § 2255 (post-conviction relief from federal convictions) are analogous to one another, the way the state habeas provisions are interpreted should be used to interpret § 2255(4).").

Finally, Appellant's interpretation of § 2255 ¶ 6(4) is contrary to the clear legislative purpose of AEDPA. It is generally accepted that one of the principal functions of AEDPA was to ensure a greater degree of finality for convictions. *See Duncan v. Walker*, 533 U.S. 167, 178, 121 S. Ct. 2120, 2127, 150 L. Ed. 2d 251 (2001); *Williams v. Taylor*, 529 U.S. 420, 436, 120 S. Ct. 1479, 1490, 146 L. Ed. 2d 435 (2000); *Jones v. United States*, 304 F.3d 1035,

1039 (11th Cir. 2002) ("A fundamental purpose for the AEDPA was to establish finality in post-conviction proceedings."); *Brackett*, 270 F.3d at 69 ("One of the signal purposes animating AEDPA is the desire of Congress to achieve finality in criminal cases, both federal and state."). Given the other substantial grounds for interpreting § 2255 ¶ 6(4) as we do, we cannot accept an alternative interpretation that would also run directly counter to the general congressional intent behind AEDPA and indefinitely extend the opportunity for post-conviction challenges.

Our view thus accords with that of the First Circuit. *See Brackett*, 270 F.3d at 68.[4] In *Brackett*, the petitioner pled guilty to federal criminal charges in July 1997, and he was sentenced as a career offender based on two prior state convictions. *Id.* at 62 His federal sentence became final on March 12, 1998. *Id.* On January 3, 2000, he filed motions in state court to vacate his prior state convictions on the ground that he was denied effective assistance of counsel. *Id.* at 63. The state prosecutor's office agreed to the motions, and his prior state convictions were vacated without any judicial finding of a constitutional violation. *Id.* On December 18, 2000, the petitioner then filed a § 2255 petition to set aside his federal sentence. *Id.* at 62. Like Appellant, he claimed that his § 2255 petition was within one year of the vacatur of his state convictions, so that under § 2255 ¶ 6(4), his petition was timely. *Id.* at 64. The First Circuit disagreed, concluding "the operative date under § 2255(4) is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned,

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[4] We have previously cited *Brackett* approvingly. *See Jones*, 304 F.3d at 1039.

the facts supporting his claim to vacate the state conviction." *Id.* at 68.

We recognize that the Fourth Circuit has recently disagreed with *Brackett*, *see United States v. Gadsen*, 332 F.3d 224 (4th Cir. 2003), but we respectfully differ with our sister circuit's interpretation of § 2255 ¶ 6(4).[5] In *Gadsen*, the petitioner pled no contest to a South Carolina assault charge on February 27, 1997. *Id.* at 225. On December 3, 1997, he was convicted in federal court of two federal crimes, and based in part on his February 1997 state conviction, was sentenced as a career offender. *Id.* On January 7, 1998—less than one year after his state conviction, merely a month after his federal conviction, and well before his federal conviction became final following appeal on June 1, 1999—the petitioner filed a petition in South Carolina state court for post-conviction relief from his state conviction. *Id.* On December 20, 1999, the South Carolina court granted his application for post-conviction relief, and the South Carolina Supreme Court declined to review that decision on January 10, 2001. *Id.* at 225-26. With this final order vacating his state conviction in hand, the petitioner filed a § 2255 petition on December 17, 2001, seeking to vacate his federal sentence on the ground that he was no longer a career offender. *Id.* at 226 The district court, however, dismissed his § 2255 petition as untimely. *Id.*

On appeal, the Fourth Circuit rejected *Brackett's* interpretation of § 2255 ¶ 6(4), treating the South Carolina

[5] As we explain *infra*, Part II.B, we would reach the same result as the Fourth Circuit in *Gadsen* on the facts as they appeared in that case, but we would do so on the basis of equitable tolling, not statutory construction. On the equitable tolling issue, however, Appellant's case is materially different from *Gadsen*.

court's vacatur of the petitioner's state conviction as a "fact" within the meaning of that section. In particular, the Fourth Circuit relied upon a passage of the Supreme Court's opinion in *Daniels* in which the Court acknowledged that "after an enhanced federal sentence has been imposed . . ., the person sentenced may pursue any channels of direct or collateral review still available to challenge his prior convictions." *Id.* at 228 (quoting *Daniels*, 532 U.S. at 382, 121 S. Ct. at 1583). The Fourth Circuit reasoned that, if it did not interpret § 2255 ¶ 6(4) liberally, "we would be punishing Gadsen and other litigants like him for having faithfully followed these instructions [from *Daniels*]." *Id.*

We think the Fourth Circuit reads the language of *Daniels* for much more than it is worth. To be sure, "the entire point of *Custis* and *Daniels* was that litigants should not bypass state courts to litigate the facts underlying their state convictions during challenges to a federal sentencing determination." *Id.* But as the First Circuit aptly put it in *Brackett*, *Custis* and *Daniels* answer the question of *where* a federal prisoner may bring an attack on a prior state conviction in order to mount an indirect attack on a federal sentence, while the question in this case (as in *Brackett* and *Gadsen*) is *when* that indirect attack may be brought. *See Brackett*, 270 F.3d at 66. The language of *Daniels* on which the Fourth Circuit relies merely outlines the procedure that a federal prisoner must follow to bring an indirect attack on his federal sentence. The "when" question was not present in *Daniels*, so the Supreme Court did not address it and the relevant passage of *Daniels* does not speak to the time limits that apply. The Fourth Circuit reads the Supreme Court's silence on this issue as dictating one interpretation of § 2255 ¶ 6(4) when it does no such thing. *Cf. Barnhart v. Walton*, 535 U.S. 212, 122 S. Ct. 1265, 1270,

152 L. Ed. 2d 330 (2002) ("Silence, after all, normally creates ambiguity. It does not resolve it.").[6]

Thus, we hold with the First Circuit and *contra* the Fourth Circuit that the purported "fact" of a state court's vacatur of a federal prisoner's prior state convictions is not a "fact supporting the claim or claims" under § 2255 ¶ 6(4) from which AEDPA's statute of limitation will run. In this case, Appellant knew all of the facts supporting his challenge to his state convictions before his federal conviction became final. On direct appeal, he attempted to argue his prior state convictions had been obtained in violation of his right to counsel, and it is probable that this was the unstated basis for his initial objection to the pre-sentence investigation report that Appellant withdrew at his sentencing hearing. Appellant was therefore aware of all the relevant operative facts before his conviction became final. Absent some basis for equitable tolling, discussed *infra*, he had to file his § 2255 motion within the one-year grace period following AEDPA's enactment, or by April 23, 1997. Appellant did not file his present § 2255 petition until February 13, 2001, so we conclude his petition was untimely under AEDPA.

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[6] We do not mean to suggest that the "when" question is entirely irrelevant to the "where" question the Supreme Court answered in *Daniels*. *Daniels* would make little sense if, in many ordinary cases, a petitioner seeking to make an indirect attack would find himself permanently shut out of federal court when he brings his § 2255 petition. As we explain *infra*, however, equitable tolling may be available to a petitioner who acts with the requisite diligence in bringing an indirect attack on his federal sentence. *See infra* Part II.B. The availability of that equitable remedy helps to render the procedure outlined in *Daniels* fair and just.

B. Equitable Tolling

Appellant also argues he is entitled to equitable tolling of the AEDPA statute of limitations. We have held that equitable tolling is appropriate when a prisoner's § 2255 petition is untimely because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1286 (11th Cir. 2002); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999). We have emphasized, however, that equitable tolling applies only in truly extraordinary circumstances. *Jones*, 304 F.3d at 1039-40; *Drew*, 297 F.3d at 1286. Appellant bears the burden of establishing that he is entitled to this extraordinary relief. *See Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1313-14 (11th Cir. 2001).

On the facts of this case, Appellant cannot show that the delay in filing his initial § 2255 petition was the result of extraordinary circumstances that were beyond his control even with the exercise of due diligence. Appellant was plainly aware of whatever facts supported his collateral attack on his prior state convictions at the time his federal sentence became final in 1996. He did not commence his challenge to the state convictions until February 1998, nearly two years later. Had Appellant been acting with due diligence, he would have attacked his state convictions immediately after his federal sentence became final, or perhaps even before he was sentenced on the federal offense. Yet Appellant has not even proffered any explanation or excuse that might show why the delay in attacking his underlying state convictions was beyond his control.

By way of comparison, Appellant has even less of a claim for equitable tolling than the petitioner in *Sandvik*. In that case, the petitioner's lawyer mailed his § 2255 petition from

Atlanta to the district court in Miami on April 18, 1997. *Sandvik*, 177 F.3d at 1270. The district court file-stamped the motion on April 25, 1997. *Id.* Because the petitioner's conviction was final prior to the effective date of AEDPA, his § 2255 motion was due no later than April 23, 1997, in accord with the one-year grace period following the enactment of AEDPA. *Id.* Thus, despite counsel's attempt to meet the deadline, the petition was untimely. When petitioner argued for equitable tolling on appeal, we concluded that petitioner's counsel could have mailed the petition earlier or used a private delivery service or a private courier to be certain that it was timely filed. *Id.* at 1272. As it was not a circumstance beyond petitioner's control with the exercise of due diligence, we found no ground for equitable tolling. *Id.* Unlike the petitioner in *Sandvik*, who at least attempted to file a petition within the one-year grace period, Appellant made no similar attempt to act diligently in this case. Rather, he did not even file the state post-conviction challenges on which his § 2255 petition was predicated until nearly two years after his federal conviction became final, despite knowing the basis for those state challenges at the time of his conviction. This is therefore hardly an extraordinary case in which petitioner was unable to meet the deadline through no fault of his own.

Appellant attempts to rescue his argument for equitable tolling by pointing to his April 25, 1997 motion in federal district court seeking to extend the time to file his § 2255 petition. Appellant claims the district court's denial of that motion without prejudice led him believe that he could still file a § 2255 petition at a later date. Yet the district court's order dismissing Appellant's 1997 motion found it to be untimely under § 2255 ¶ 6(1), and it only suggested that he could subsequently file a § 2255 petition if he could establish one of the later accrual dates set forth in § 2255 ¶ 6. As

explained *supra*, however, Appellant cannot come within § 2255 ¶ 6(4) to establish a later accrual date.

Appellant also points to the footnoted caveat in our opinion affirming his sentence on direct appeal, claiming the caveat misled him into thinking § 2255 relief would be available whenever he successfully attacked his state convictions. Nothing in our caveat suggested that Appellant could take an unlimited time to commence his collateral attack on his state convictions.[7] In addition, our opinion affirming his conviction issued prior to the effective date of AEDPA; the caveat may not have contemplated the effect of the new AEDPA limitations period. Following the enactment of AEDPA, Appellant still had the entire one-year grace period within which to take *some* action to attack his conviction and sentence, yet he did nothing.

This is the fundamental problem that plagues Appellant's argument: the long delay before he commenced his state collateral attacks. *Drew* presented a somewhat similar scenario. In that case, the petitioner filed a timely § 2254 petition, which the district court dismissed without prejudice while ordering the petitioner to first file a third state motion for post-conviction relief. *See Drew*, 297 F.3d at 1287. Though the petitioner complied with the district court's order, we concluded that equitable tolling was not warranted in that

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[7] In this respect, our caveat is like the passage of *Daniels* that the Fourth Circuit over-emphasizes; our statement, like the Supreme Court's statement in *Daniels*, says nothing about the applicable time limits for an indirect attack. This is not surprising, since our caveat was explicitly noted "in passing." One cannot infer from such a passing statement how the background statute of limitations would apply to Appellant when he finally got around to bringing his indirect attack on his federal sentence.

case in part because the petitioner delayed filing the state motion. *Id.* If the timeliness of that petitioner's initial § 2254 petition did not justify equitable tolling because of his subsequent delay, it is impossible to find any justification for equitable tolling in this case, where Appellant's initial motion was not even timely in the first place.

The facts of *Gadsen* are usefully illustrative on this point. The petitioner in *Gadsen* collaterally attacked his prior state conviction in state court before his federal conviction and sentence were even final. *Gadsen*, 332 F.3d at 225. His state collateral attack was pending in the South Carolina courts for three years, until he ultimately prevailed. *Id.* at 226. If that petitioner were not given the benefit of equitable tolling, then under our interpretation of § 2255 ¶ 6(4), he would be precluded from carrying out his indirect attack for no other reason that the state courts' delay. Such a result would obviously be unfair. Under our circuit precedents, however, we would readily conclude the South Carolina courts' delay in finally disposing of the petitioner's state collateral attack amounted to an extraordinary circumstance beyond the petitioner's control. And because the petitioner launched his challenge in the South Carolina state courts before his federal conviction was final, there can be no doubt as to the petitioner's diligence in pursuing his claims. Thus, while we depart from the Fourth Circuit's opinion on the issue of statutory interpretation, *see supra* part II.A, on the facts of *Gadsen* we would ultimately reach the same result as our sister circuit by allowing that petitioner equitable tolling.

The facts of the present petition, however, are materially different from those in *Gadsen*; the crucial point here is that Appellant did nothing during the one-year AEDPA grace period to attack his prior state convictions collaterally. Unlike the petitioner in *Gadsen*, Appellant did not commence his

state collateral attack until almost two years after his federal sentence became final, and then nearly one year after AEDPA's one-year grace period expired. Given that delay, we are compelled to find there are no extraordinary circumstances in Appellant's case, nor can we conclude that Appellant acted with appropriate diligence. We cannot allow equitable tolling of the AEDPA limitations period on the facts of this case.[8]

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[8] In a final effort to get the benefit of equitable tolling, Appellant claims the denial of equitable tolling would be unconstitutional suspension of the writ of habeas corpus. We have already held that the AEDPA limitations periods do not *per se* constitute a suspension of the writ. *See Tinker v. Moore*, 255 F.3d 1331, 1334 (11th Cir. 2001); *Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213 (11th Cir. 2000). Appellant's argument therefore fails.

In addition, we do not reach Appellant's further argument--raised for the first time on appeal--that the failure to reach the merits of his § 2255 petition would amount to a miscarriage of justice. Arguments not raised in the district court are waived. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam).

III. CONCLUSION

We hold the vacatur of Appellant's prior state convictions is not a "fact supporting the claim or claims" within the meaning of 28 U.S.C. § 2255 ¶ 6(4). Under the statute of limitations that applies to § 2255 petitions, Appellant's petition was therefore untimely. Further, we hold Appellant cannot show, on the facts of this case, that his petition was untimely because of extraordinary circumstances beyond his control and unavoidable even with the exercise of due diligence. He therefore is not entitled to equitable tolling.

AFFIRMED.

RONEY, Circuit Judge, dissenting:

I respectfully dissent. In my judgment, Johnson's February 13, 2001 § 2255 petition for writ of habeas corpus should not have been dismissed as untimely because the one-year statute of limitation on the claim asserted did not begin to run until October 24, 2000, the date the state court vacated Johnson's July 5, 1989 state conviction for distribution of cocaine - one of the two prerequisite state convictions relied upon by the district court to enhance Johnson's sentence under the career offender category of the Sentencing Guidelines.

Contrary to the Court's opinion, I think a decision of a state court reversing a state criminal conviction is a "fact" within the meaning of 28 U.S.C. § 2255 ¶ 6(4). *See United States v. Gadsen*, 332 F.3d 224, 229 (4th Cir. 2003) (holding that "the federal statute of limitations begins running when the state court conviction is conclusively invalidated"); *United States v. Hoskie*, 144 F. Supp. 2d 108, 111 (D. Conn. 2001) (holding that "the one-year statute of limitations starts to run on the date the state convictions are vacated, not an earlier date when the defendant discovered the facts forming the basis for the attack on the state convictions").

With this Court's decision and the decision in *Brackett v. United States*, 270 F.3d 60, 68 (1st Cir. 2001) (holding that "the operative date under § 2255(4) is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction"), there is a clear split in the circuits, which at some point should be resolved by Congress or the Supreme Court. Without question, if the rule announced in this decision and in *Brackett* is consistently applied, in some circuits there will be defendants serving time in federal prison under a federal

sentence based upon conviction of a state crime that the state court has authoritatively held the defendant unquestionably did not commit, who would be barred from relief, while in other circuits relief from such imprisonment will be readily available.

The relevant section, 28 U.S.C. § 2255 ¶ 6(4), provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> . . . .
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

As a "fact" within the meaning of this section, it is obviously new and not previously discoverable because until the state court actually entered the judgment reversing seven outstanding convictions, including Johnson's July 5, 1989 conviction, it had yet to happen and therefore, by definition, could not be a fact at all. *See* Black's Law Dictionary 610 (7th ed. 1999) (defining "fact," "1. Something that actually exists"); Webster's Third New International Dictionary 813 (1993) (defining "fact," "1: a thing done"); The American Heritage Dictionary of the English Language 46 (1975) (defining "fact," "1. something known with certainty"); Black's Law Dictionary 738 (3d ed. 1933) (defining "fact," "1- a thing done"); *see also United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (en banc) ("Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it

said."). Until that date, the fact was that Johnson stood convicted of those numerous crimes. The fact that he does not now stand convicted of those crimes clearly supports his claim because: (1) those seven vacated convictions were relied upon by the sentencing court in one way or another in deriving Johnson's total offense level of 25 and a criminal history category of 6; and (2) only *one* of the two required convictions relied upon by the district court to enhance Johnson's sentence as a career offender was a valid conviction. Without Johnson's vacated July 5, 1989 state conviction for distribution of cocaine, the undeniable fact is that he was not a career offender within the meaning of the Sentencing Guidelines. *See, e.g., United States v. Duty*, 302 F.3d 1240, 1241 (11th Cir. 2002) (noting that a defendant is a "career offender" under the Sentencing Guidelines if, *inter alia*, "the defendant has at least two prior felony convictions for either a crime of violence or a controlled substance offense"); U.S.S.G. § 4B1.1. The sentencing court did not rely upon the underlying conduct that resulted in those convictions, but instead simply relied upon the mere fact that those were valid state court convictions, as recited in the Presentence Investigation Report ("PSI").

Johnson's PSI indicates a total offense level of 25 and a criminal history category of 6, qualifying him for a sentencing range of 110 to 137 months' imprisonment. *See* U.S.S.G. Ch. 5, Pt. A. The district court, however, relied upon the "facts" of *two* prior state convictions to boost Johnson into the career offender category and thus increase his sentence: (1) a July 5, 1989 conviction for distribution of cocaine; and (2) a November 13, 1989 conviction for sale of cocaine. Utilizing the career offender enhancement, the district court enhanced the total offense level from 25 to 32 with a criminal history category of 6, qualifying Johnson for a sentencing range of 151 to 188 months' imprisonment. *See id.* § 4B1.1(b). The

district court sentenced Johnson to 188 months' imprisonment, the highest end of that sentencing range. *See id.* Ch. 5, Pt. A.

As a timely petition, the case should be remanded for the district court to consider Johnson's claims on the merits. If that petition is granted and a resentencing is ordered, Johnson may indeed be faced with some new problems.

Johnson's state petition did not assert that he was innocent of the facts which supported his conviction, but simply alleged that although he pled guilty in each case, the convictions were nonetheless invalid because he did not affirmatively waive his right to counsel. The state made no genuine attempt to defeat his claim, perhaps because Johnson had already served the state prison sentences accompanying those state convictions. This lack of defense to the state petitions is reflected in the state court's opinion, which leaves some doubt as to whether Johnson met the *Strickland* standard for relief from a claim of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The state court's opinion reads as follows:

> Petitioner, after being sentenced to an enhanced sentence because of certain state convictions, filed his Petition for Writ of Habeas Corpus alleging that his pleas in seven cases in Cook County Superior Court were not voluntary in that he did not knowingly, intelligently and voluntarily waive his right to counsel at the hearing on the entry of his guilty pleas. The cases that were challenged by Petition were numbered 83F-9 [Feb. 11, 1989 - burglary], 88F-32 [Mar. 9, 1988 - conversion], 88M-43 [Mar. 9, 1988 - contempt], 89F-122 [July 5, 1989 - distribution of

> cocaine], 90F-383 [Dec. 5, 1990 - theft and violation of probation], 92F-36 [Mar. 11,1992 - possession of cocaine] and 93F-148 [April 21, 1993 - possession of cocaine] filed in Cook County Superior Court.
>
> Petitioner . . . filed copies of the plea petitions that accompanied the entry of his pleas. These pleas contained questions about his waiver of the presence and use of an attorney.
>
> The State responded denying the allegations but have not filed any further transcripts of the hearing which would support their position.
>
> This Court findings that the record in these cases does not show an affirmative waiver of his right to an attorney. . . .
>
> IT IS HEREBY ORDERED that Petitioner's Petition For Writ of Habeas Corpus is hereby GRANTED and the convictions in the above-cited cases are hereby reversed.

Regardless of the ground for the decision, this state court judgment reversed those convictions, and they are no longer valid convictions upon which a sentencing court could rely. That state court judgment is entitled to the same fact analysis as if the convictions had been reversed on the basis of irrefutable evidence that a defendant was in fact innocent of the crimes for which he had been convicted. If the state court's vacatur of the seven state convictions came before the sentencing in this case, it would have been clear error for the court to rely on the fact of conviction. Without those convictions to rely upon, an analysis of Johnson's PSI would show: (1) only three criminal history points derived from

Johnson's November 13, 1989 sale of cocaine conviction, corresponding to an offense level of 25 and a criminal history category of 2; and (2) an insufficient number of prior offenses (one) to support a career offender enhancement.

At the time of sentencing, the PSI properly noted that U.S.S.G. § 4A1.3 provides that a sentencing court may depart upward if "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3. This Court has affirmed several circumstances where a district court applied an upward departure under § 4A1.3. *See, e.g., United States v. Jones*, 289 F.3d 1260 (11th Cir. 2002) (two-level criminal history category upward departure for a defendant's prior juvenile offenses and other offenses too remote to use in calculating a criminal history under the guidelines); *United States v.* Hernandez, 160 F.3d 661 (11th Cir. 1998) (one-level criminal history category upward departure for a defendant's prior non-criminal misconduct related to the sentenced offense); *United States v. Spraggins*, 868 F.2d 1541 (11th Cir. 1989) (three-level criminal history upward departure for defendant with history of molesting children, the need to deter such conduct in the future, and to account for defendant's older previous crimes); *United States v. Dorsey*, 888 F.2d 79 (11th Cir. 1989) (upheld district court's upward departure to a career offender, even though defendant did *not* have two qualifying prior felony convictions under 4B1.1).

Based on the information contained in the PSI, it may well be that a departure upward would be appropriate, but these are matters not before us at this time. The sole issue before us is whether Johnson's § 2255 petition is timely because it was filed within one year of the Georgia state court's vacatur of

Johnson's seven prior state convictions. I would hold that it was timely, would reverse the decision of the district court to the contrary, and would remand to the district court for consideration of the petition on its merits.

UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

Case No. 01-14830
Disctrict Court Docekt No.
01-00014-CV-WDO-7

[Filed August 5, 2003]

ROBERT JOHNSON, JR., Petitioner-Appellant,	)
versus	)
UNITED STATES OF AMERICA, Respondent-Appellee	)

Appeal from the United States District Court
for the Middle District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 5, 2003
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

CASE NO. 7:01-CV- 14 (WDO)
28 U.S.C. § 2255

CASE NO. 7:94-CR-07 (WDO)

[Filed August 1, 2001]

ROBERT JOHNSON, JR., PETITIONER,	)
v.	)
UNITED STATES OF AMERICA, RESPONDENT.	)

ORDER

After full consideration of Petitioner's Motion to Vacate Set Aside or Correct his sentence pursuant to 28 U.S.C. § 2255, the Report and Recommendation of the Magistrate Judge, and Petitioner's Objections to the Magistrate Judge's Recommendation,

IT IS DETERMINED that Petitioner's 1994 sentence in this court became final upon denial of his application for *writ*

of certiorari to the U.S. Supreme Court on April 24, 1996, and that despite his success in getting his prior state sentences set aside on October 24, 2000, the AEDPA statute of limitations of 1-year within which he had to file a timely 28 U.S.C. § 2255 Motion to Vacate Set Aside or Correct his sentence had expired on April 24, 1997. Petitioner had taken no action to toll the statute for a period of 21 months before he filed his state habeas corpus action.

Petitioner cites *United States v. Walker,* 198 F.3d 811, (11th Cir. 1999), which is factually similar, but distinguishable in a very important matter. Walker's federal conviction was affirmed by the 11th Circuit in 1996; his petition for *certiorari* was denied in 1996. In 1997, Walker filed a §2255 motion alleging his enhanced sentence was based upon an unconstitutional state sentence. The district court dismissed Walker's 2255 motion in 1998, ruling that Walker's claim was not ripe as the state sentence had not yet been set aside. Walker filed a state habeas corpus action immediately, and, apparently without contest, the state court vacated Walker's prior state sentence. "Then Walker, pursuant to Section 2255 and Fed.R.Civ.P.60(b), moved for relief from his 1996 ACCA federal sentence, requesting that the district court vacate the enhanced sentence as one of his three state predicate convictions now had been vacated. [FN4] The district court ordered a new PSI... re-computed without reference to the 1979 (state) conviction. It then granted walker's Section 2255 petition." *Walker,* 198 F.3d at 813.

FN4. This was ninety-three days after the initial Section 2255 petition had been denied. Since less than one year had passed between the denial of the petition for writ of certiorari and the filing of the petition, less the time the statute was tolled when the petition was pending, the statute of limitations was not violated. 28 U.S.C. §2255.

Id. Unlike Petitioner Johnson, Walker, very clearly, filed his Section 2255 Motion within the AEDPA 1-year statute of limitations. Petitioner Johnson did nothing for 21 months after the denial of his application for *certiorari* to the U. S. Supreme Court. In fact, a period of almost five (5) years passed before he eventually filed his Section 2255 motion on February 13,2001.

WHEREFORE, having found Petitioner's Motion to Vacate Set Aside or Correct his 1994 sentence to be time-barred by the statute of limitations, the Report and Recommendation of the United States Magistrate Judge is hereby, approved, adopted and made the Order of the Court. Petitioner's Objections to the Report And Recommendation filed June 1, 2001, after thorough consideration, are found to be without merit. No issues having been found requiring determination by evidentiary hearing, Petitioners' request for an evidentiary hearing is also Denied.

SO ORDERED, this 1st day of August 2001.

/s/ WILBUR D. OWENS, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

CASE NO: 7:01-CV-14-WDO
CASE NO. 7:94-CR-07 (WDO)

[Filed August 7, 2001]

ROBERT JOHNSON, JR., Petitioner	)
v.	)
UNITED STATES OF AMERICA, Respondent	)

JUDGMENT

Pursuant to the order of this Court filed August 1, 2001, and for the reasons stated therein, JUDGMENT is hereby entered denying petitioner Johnson's motion for relief under 28 U.S.C. Section 2255.

This 7 day of August, 2001.

GREGORY J. LEONARD, CLERK

BY: /s/ Nora Paul
Criminal Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

CASE NO. 7:01-CV- 14 (WDO)
28 U.S.C. § 2255

CASE NO. 7:94-CR-07 (WDO)

[Filed May 11, 2001]

ROBERT JOHNSON, JR., PETITIONER,	)
v.	)
UNITED STATES OF AMERICA, RESPONDENT.	)

REPORT AND RECOMMENDATION

Petitioner Johnson was charged by Indictment returned in this court on March 18, 1994 withConspiracy to Possess Cocaine Base With Intent to Distribute in violation of 21 U.S.C. § 846 i/c/w 21 U.S.C. § 841(a)(1), and with five counts of Distribution of Cocaine Base in violation of 21 U.S.C. § 841(a)(1). On June 2, 1994, in exchange for certain considerations from the Government, Petitioner entered into a Plea Agreement (Tab 113) and pled guilty to Count Two as

contained in the Indictment. He was sentenced by this court on November 18, 1994 to serve 188 months imprisonment. (Tab 136.) Petitioner appealed his sentence to the Eleventh Circuit Court of Appeals where the same was affirmed on February 1, 1996. (Tab 163.) Petitioner applied to the Supreme Court for a writ of certiorari which was denied by that Court on April 24, 1996. (Tab 169.) Almost five years thereafter, on February 13, 2001, Petitioner filed the instant Section 2255 Motion to Vacate Set Aside or Correct his sentence. (Tab 180.)

THE TIME-BAR ISSUE

The Anti-Terrorism and Effective Death Penalty Act (AEDPA) codified as part of 28 U.S.C. § 2255 became effective on April 24, 1996. The relevant portion of 28 U.S.C. § 2255 is as follows:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Until March of this year, 2001, the Eleventh Circuit Court of Appeals had not addressed at what point a conviction becomes final in cases where a defendant is unsuccessful on appeal and thereafter files a petition for a writ of certiorari with the Supreme Court. In *Washington v. United States*, 2001 WL 237243 (11th Cir. 2001), the Court joined the other appellate courts which had ruled on the issue and held that such a conviction becomes final on the day the Supreme Court denies a defendant's certiorari petition, and the AEDPA's statute of limitations in light of Rule 6(a), Fed. R.Civ. P., starts the period of limitations running on the day following the Supreme Court's decision. *Id.* Therefore, the AEDPA one-year period of limitation began to run on Petitioner's right to file his Section 2255 Motion to vacate his sentence on April 24, 1996 and, unless it was tolled, would have expired on April 24, 1997. 28 U.S.C. § 2255.

The Eleventh Circuit Court of Appeals has held that the AEDPA'S one-year limitations period for motions to vacate, set aside, or correct sentences may be equitably tolled when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence. *Sandvik v. United States*, 177 F. 3d 1269, (11th Cir. 1999). *See Irwin v. Department of Veteran's Affairs*, 498 U.S. 89, 95-96, 111 S. Ct. 453,457 (1990) "(Federal Courts) have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."

PETITIONER' S CONTENTION

What does Petitioner contend should toll the running of the one-year period of limitations before April 24, 1997 (the deadline) until he eventually filed his Motion on February 13, 2001? Petitioner asserts as his sole ground for relief in the instant petition that he suffered a *due process* violation in that his sentence was based on seven invalid prior state convictions used to categorize him as a career offender under the Sentencing Guidelines. Petitioner appealed his sentence to the Eleventh Circuit Court of Appeals where he raised the issue of his prior state convictions as being entered uncounseled and without waiver of his constitutional rights, and therefore invalid as a basis for career offender status in his federal sentence.

The Court of Appeals, in an unpublished opinion (Tab 163), refused to consider Petitioner's objection to his sentence as raised for the first time on appeal, but added in a sole footnote:

> We note in passing that, should appellant obtain at some future date the vacation of the state court conviction in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide.

[It is salient to note that the appellate court stated that Petitioner could petition the district court *under 28 U.S.C. § 2255* for the relief he sought there.]

When the sentencing court gives explicit consideration to a defendant's record of previous convictions, which are later conclusively determined to be unconstitutionally invalid, the

case should be remanded to the district court for resentencing with reconsideration of the invalid prior sentences. *Tucker v. United States*, 92 U.S. 443, 92 S. Ct. 589, 590(1972). *See Custis v. United States*, 511 U. S. 485, 114 S. Ct. 1732, 1739 ("If [defendant] is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentence."). *See United States v. Roman*, 989 F.2d 1117, 1120 (11th Cir. 1993) (en banc) (suggesting that the constitution may only require such collateral review of uncounseled convictions). All of the foregoing authorities preceded 28 U.S.C. § 2255 as amended by the AEDPA.

Petitioner contends that the statutory one-year period within which he had to file his instant Section 2255 motion began to run from October 24, 2000, the date on which the state habeas court reversed his prior state convictions. This may be construed as a claim of newly discovered evidence by which Petitioner seeks to apply section (4) of 28 U.S.C. § 2255: "The limitation period shall run from the... the date in which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." Petitioner may be claiming surprise.

The issue thus becomes whether Petitioner exercised due diligence in filing his state habeas corpus petition regarding the claim of invalid prior state convictions, in order to meet the time limitation for filing his Section 2255 Motion. It is evident that Petitioner was fully aware of the claimed infirmity of his prior state convictions at the time of the appeal of his sentence to the Eleventh Circuit Court of Appeals, inasmuch as that was the sole issue he raised before that court, which ruled adversely to him on February 1, 1996. He attempted to obtain a writ of certiorari on the Court of Appeals decision. That application was denied by the

Supreme Court on April 24, 1996. The fact that the date of the denial of certiorari and the effective date of the AEDPA' s period of limitation was the same is purely coincidental. Together they initiate the running of Petitioner's one-year limitation for the filing of his state proceeding challenging the constitutional validity of his state convictions to constitute any equitable tolling of the AEDPA 1-year period of limitation. Petitioner's *due diligence* must be measured from that date, especially in view of the admonition from the decision of the Eleventh Circuit Court of Appeals. (Tab 163.)

Again, the relevant portion of AEDPA period of limitation is as follows:

> A 1-year period 0flimitation shall apply to a motion under this section. The limitation period shall run from the latest of-
>
> (l) the date on which the judgment of conviction becomes final; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255. The records of Wayne County Superior Court show, as Petitioner alleges and exemplifies by Exhibit A attached to his Motion, that, by Order of that court, dated October 24, 2000, in Habeas Corpus Action No. 98-CV- 086, Petitioner's convictions in case Nos. 83F-9, 88F-32, 88M-43, 89F-122, 90F-383, 92F-36, and 93F-148 from Cook County Superior Court, were reversed as unconstitutionally uncounseled. However, the official records of Wayne County Superior Court, attached hereto, also disclose that Petitioner's state Habeas Corpus Action No. 98-CV-086 was not filed in that court until February 6, 1998, more than twenty-one (21)

months after his sentence became final by the Supreme Court's denial of his application for writ of certiorari, and more than nine (9) months after the expiration of the 1-year AEDPA period of limitations he had to file for collateral relief in this court. Petitioner cannot make a credible argument for due diligence when he waited 21 months to file his state action as suggested to him by the Eleventh Circuit Court of Appeals. While his pleadings may be given liberal construction, "Liberal construction does not mean liberal deadlines." *Wayne v. Jarvis,* 197 F. 3d 1098, 1104 (11th Cir. 1999). Petitioner' s instant Motion to vacate his sentence cannot be said to have been filed *under* [the provisions of] 28 U.S.C. § 2255. Petitioner's instant Motion to Vacate Set Aside or Correct his sentence is, therefore, time-barred pursuant to the provisions of the AEDPA codified in 28 U.S.C. § 2255, and should be summarily denied.

WHEREFORE, IT IS RECOMMENDED that Petitioner's Motion be DENIED. Pursuant to 28 U.S.C. § 636 (b)(i), the parties may serve and file written objections to this Recommendation with the United States District Judge, WITHIN TEN (10) DAYS after being served with a copy hereof.

SO RECOMMENDED this 9th day of February in the year 2000.

/s/ G. MALLON FAIRCLOTH
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

IN THE SUPERIOR COURT OF WAYNE COUNTY
STATE OF GEORGIA

CIVIL ACTION NO.: 98-CV-086
HABEAS CORPUS

[Filed October 24, 2000]

ROBERT JOHNSON, JR.	)
Petitioner,	)
	)
v.	)
	)
THE STATE OF GEORGIA,	)
Respondent.	)
	)

ORDER

Petitioner, after being sentenced in Federal Court to an enhanced sentence because of certain state convictions, filed his Petition For Writ of Habeas Corpus alleging that his pleas in seven cases in Cook County Superior Court were not voluntary in that he did not knowingly, intelligently and voluntarily waive his rtght to counsel at the hearing on the entry of his guilty pleas. The cases that were challenged by Petition were numbered 83F-9, 88F-32, 88M-43, 89F-122, 90F-383, 92F-36 and 93F-148 filed in Cook County Superior Court.

Petitioner, in his Petition, filed copies of the plea petitions that accompanied the entry of his pleas. These plea petitions contained questions about his waiver of the presence and use of an attorney.

The State responded denying the allegations but have not filed any further transcripts of the hearings which would support their position.

This Court finds that the record in these cases does not show an affirmative waiver of his right to an attorney. See Clowers v. State, 272 Ga. 463 (2000) and Bazemore v. State, Georgia Supreme Court docket number S00A1100, decided October 10, 2000.

IT IS HEREBY ORDERED that Petitioner's Petition For Writ of Habeas Corpus is hereby **GRANTED** and the convictions in the above-cited cases are hereby reversed.

SO ORDERED, this 24th day of Oct., 2000.

/s/ Robert L. Scoggin
Senior Judge
Superior Courts of Georgia

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94-9402
Non-Argument Calendar

D. C. Docket No. CR-94-7-VAL-WDO

[Filed December 22, 1995]

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)
)
ROBERT JOHNSON JR.,)
a/k/a "Rootman",)
Defendant-Appellant.)

Appeal from the United States District Court
for the Middle District of Georgia

Before TJOFLAT, Chief Judge, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

Following appellant's plea of guilty to distribution of cocaine base, the district court sentenced appellant as a career

offender to a prison term of 188 months. Appellant seeks the vacation of his sentence on the ground that the district court, in concluding that he was a career offender, considered prior state court convictions that, according to appellants were based on guilty pleas entered by appellant without a valid waiver of his constitutional rights.

Appellant raises this objection for the first time on appeal. At sentencing, when the district court asked appellant whether he had any objections to the sentence the court imposed, he stated that he had none. Because the district court's fact findings on the career offender issue are not clearly erroneous and because our refusal to consider the objection appellant now raises would not result in manifest injustice, we do not consider whether, as appellant contends, state court convictions relied on by the district court were obtained in violation of his constitutional rights.[1]

AFFIRMED.

[1] We note in passing that, should appellant obtain at some future date the vacation of the state court conviction in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide.

ORIGINAL

No. 03-9685

Supreme Court, U.S.
FILED
JUL - 2 2004
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT JOHNSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

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QUESTION PRESENTED

Whether, when a federal prisoner whose sentence was enhanced on the basis of a state-court conviction files a motion to vacate the sentence on the ground that the state-court conviction has since been vacated, the vacatur of the state-court conviction is the "fact[] supporting the claim" that triggers the running of the one-year limitation period under 28 U.S.C. 2255 ¶ 6(4).

IN THE SUPREME COURT OF THE UNITED STATES

No. 03-9685

ROBERT JOHNSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-31a) is reported at 340 F.3d 1219. The order of the district court (Pet. App. 33a-35a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2003. A petition for rehearing was denied on December 22, 2003 (Pet. App. 1a-6a). The petition for a writ of certiorari was filed on March 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the Middle District of Georgia, petitioner was convicted of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to 188 months of imprisonment. The court of appeals affirmed, and this Court denied certiorari. Petitioner then filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied the motion, and the court of appeals affirmed.

1. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, there was no statutory time limit on the filing of a motion to vacate a federal prisoner's sentence under 28 U.S.C. 2255. The AEDPA established such a limitation period. Paragraph 6 of Section 2255 now provides that "[a] 1-year period of limitation shall apply to a motion under this section." Paragraph 6 also provides that the limitation period runs "from the latest of" four events, including "the date on which the judgment of conviction becomes final," 28 U.S.C. 2255 ¶ 6(1), and "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence," id. ¶ 6(4). The AEDPA took effect on April 24, 1996, but in cases in which the judgment of conviction became "final" before that date, the courts of appeals have uniformly afforded prisoners a one-year grace period, running

from the AEDPA's effective date, within which to file their Section 2255 motions. See Pet. App. 12a n.2.

2. On six occasions in 1993 and 1994, petitioner sold cocaine base to undercover law-enforcement officers in Lenox, Georgia. Petitioner made some of the sales while he was on weekend furloughs from the Cook County, Georgia, Jail, where he was serving a sentence for a prior state drug offense. PSR ¶¶ 9-15, 60-61.

3. A grand jury in the Middle District of Georgia returned an indictment charging petitioner with one count of conspiracy to possess cocaine base with the intent to distribute it, in violation of 21 U.S.C. 846, and five counts of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Pursuant to a plea agreement, petitioner pleaded guilty to a single count of distribution. Gov't C.A. Br. 2; PSR ¶¶ 1, 5-6.

The Presentence Investigation Report (PSR) determined that petitioner had at least eight prior convictions, which resulted in a total of 20 criminal history points and placed him in criminal history category VI. PSR ¶¶ 39-64. The PSR also determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1, based on two 1989 convictions in Cook County, Georgia, Superior Court for distribution of cocaine. PSR ¶¶ 32-33, 65. Petitioner's offense level under the career-offender provision was 32, see Sentencing Guidelines § 4B1.1(b)(C), and, with a three-level reduction for acceptance of responsibility, the applicable

Guidelines range was 151 to 188 months of imprisonment. PSR ¶¶ 32-36, 79. If petitioner had not been classified as a career-offender, his offense level would have been 25, and his Guidelines range would have been 110 to 137 months of imprisonment. PSR ¶ 79.

Petitioner filed written objections to the PSR, including an objection to his classification as a career offender, but he did not explain the basis for that objection. At the sentencing hearing, petitioner's counsel advised the district court that the objections to the PSR were being withdrawn, and petitioner confirmed that he did not wish to pursue his objections. The district court sentenced petitioner as a career offender, and imposed a prison term of 188 months. Pet. App. 8a; Gov't C.A. Br. 4; PSR Addendum 1.

4. Petitioner appealed his sentence, arguing that he should not have been sentenced as a career offender, because his prior state-court convictions were based on guilty pleas entered without a valid waiver of his right to counsel. Pet. App. 8a, 47a. The court of appeals affirmed. Id. at 46a-47a. Because petitioner had waived his objection to the career-offender classification at the sentencing hearing, the court of appeals declined to consider whether his prior convictions were valid. Id. at 47a. In a footnote, the court "note[d] in passing" that, if the state-court convictions were vacated at some future date based on a determination that they had been obtained in violation of

petitioner's constitutional rights, "he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide." Pet. App. 47a n.1. On April 22, 1996, this Court denied petitioner's petition for a writ of certiorari. Johnson v. United States, 517 U.S. 1162.

5. On April 25, 1997, a year and a day after the AEDPA's effective date, petitioner filed a motion to extend the time for filing a motion under 28 U.S.C. 2255. The district court ruled that petitioner's motion was untimely under paragraph 6(1) of Section 2255. The court denied the motion without prejudice, however, noting that circumstances might later arise that would allow petitioner to file a timely motion under a different subsection of paragraph 6. Pet. App. 9a.

6. On February 6, 1998, petitioner filed a petition for a writ of habeas corpus in Wayne County, Georgia, Superior Court, challenging seven of his prior state convictions on the ground that he had not validly waived his right to counsel at the guilty-plea hearings in those cases. Pet. App. 9a, 44a-45a. On October 24, 2000, the state court granted the petition and vacated petitioner's convictions. Ibid. Noting that the State had responded to the petition by denying the allegations but had not "filed any further transcripts of the hearings," the Superior Court found that "the record in these cases does not show an affirmative waiver of [petitioner's] right to an attorney." Id. at 45a.

7. On February 13, 2001, petitioner filed a motion under 28 U.S.C. 2255 in which he claimed that, as a consequence of the vacatur of the state convictions, he no longer qualified as a career offender. Pet. App. 9a. Petitioner contended that his motion was timely because the state court's order granting his habeas corpus petition "constitute[d] new evidence which did not exist and could not have been discovered" earlier, and the one-year time limit therefore began to run on the date of the state court's decision. Mem. in Support of Mot. to Vacate, Set Aside or Correct Sentence 3.

A magistrate judge recommended that petitioner's Section 2255 motion be denied as untimely. Pet. App. 37a-43a. The district court adopted the magistrate judge's report and recommendation and denied the motion, holding that the AEDPA's one-year limitations period expired on April 24, 1997. Id. at 33a-35a. The court noted that petitioner had waited 21 months from the denial of his certiorari petition to file his state-court habeas corpus petition, and that "a period of almost five * * * years [had] passed before he eventually filed his Section 2255 motion." Id. at 35a. The court of appeals issued a certificate of appealability on the question whether petitioner's Section 2255 motion was timely. Id. at 8a.

8. A divided panel of the court of appeals affirmed. Pet. App. 7a-31a.

a. The majority rejected petitioner's claim that the statute of limitations did not begin to run until October 24, 2000, when the state court vacated his prior convictions. Agreeing with the First Circuit's decision in Brackett v. United States, 270 F.3d 60 (2001), cert. denied, 535 U.S. 1003 (2002), and disagreeing with the Fourth Circuit's decision in United States v. Gadsen, 332 F.3d 224 (2003), see Pet. App. 15a-18a, the majority held that "a state court's vacatur of a federal prisoner's prior state convictions is not a 'fact supporting the claim or claims' under § 2255 ¶ 6(4) from which AEDPA's statute of limitation will run," Pet. App. 18a. The majority distinguished "legal propositions and results from the 'facts' referred to in § 2255," reasoning that a "factual proposition is typically something capable in principle of falsification * * * by some empirical inquiry, while a legal proposition is identified by consulting some authoritative legal source." Id. at 12a.

The majority also held that petitioner was not entitled to relief under the doctrine of equitable tolling, because he could not show that his delay in filing the Section 2255 motion "was the result of extraordinary circumstances that were beyond his control even with the exercise of due diligence." Pet. App. 19a. The court noted that petitioner "was plainly aware of whatever facts supported his collateral attack on his prior state convictions at the time his federal sentence became final in 1996," but "did not

commence his challenge to the state convictions until February 1998, nearly two years later." Ibid. The court contrasted petitioner's situation with that of the defendant in Gadsen, who did exercise "diligence in pursuing his claims." Id. at 22a.

In holding that his Section 2255 motion was time-barred, the majority rejected petitioner's reliance on "the footnoted caveat in [its] opinion affirming his sentence on direct appeal": that, if his state-court convictions were later vacated, he could file a motion under Section 2255. Pet. App. 21a. The court explained that "[n]othing in our caveat suggested that [petitioner] could take an unlimited time to commence his collateral attack on his state convictions," and noted that, while petitioner had the entire one-year grace period after the AEDPA's enactment "within which to take some action to attack his conviction and sentence," he instead "did nothing." Ibid.

b. Judge Roney dissented. Pet. App. 25a-31a. In his view, the state court's decision vacating petitioner's prior convictions was a "fact" under paragraph 6(4) of Section 2255 that was "obviously new and not previously discoverable" until the state court issued its ruling. Pet. App. 26a.

9. The court of appeals denied petitioner's petition for rehearing en banc. Pet. App. 1a-2a. Judge Barkett dissented from that order. Pet. App. 3a-4a. Reasoning that "no metaphysical barrier prevents a legal consequence from sometimes operating as a

fact," she expressed the view that "the vacatur of [a] state conviction is a fact because it is something that actually occurred and can be proven in support of [petitioner's] claim." Pet. App. 3a-4a.

ARGUMENT

Petitioner contends that, when a motion under 28 U.S.C. 2255 is based on a state-court decision vacating a prior conviction, the motion is timely under paragraph 6(4) of Section 2255 if it is filed within one year of the state court's decision, because the decision is the "fact" supporting the defendant's claim. Pet. 6-19. The court of appeals' contrary conclusion is correct; its decision does not conflict with any decision of this Court; and while the decision below does conflict with the Fourth Circuit's decision in Gadsen, there is no need for the Court to resolve that conflict at this time. Further review is therefore unwarranted.*

1. Petitioner is mistaken in his contention that "'facts' as used in * * * ¶ 6(4) is a generic term designed to capture any potential basis for a § 2255 claim." Pet. 13. As the First Circuit explained in Brackett, the "most natural reading" of the phrase "facts supporting the claim or claims" in paragraph 6(4) is that it refers to "basic, primary, or historical facts," not to court decisions or their legal consequences. 270 F.3d at 68-69.

---

* The issue raised here is also raised in another case, Rivers v. United States, No. 03-9629 (filed Mar. 18, 2004), that is pending before this Court.

Accord Pet. App. 12a. It would be "an odd usage" to describe a court decision vacating a prior conviction as a "fact" that "could have been discovered" by the prisoner, Brackett, 270 F.3d at 68, because "the vacatur of prior state convictions is a court action obtained at the behest of a federal prisoner, not [something that is] 'discovered' by him," Pet. App. 13a. Other subsections of the limitation provision also support this distinction between facts and court decisions. Paragraph 6(1) of Section 2255 refers to "the date on which the judgment of conviction becomes final," and paragraph 6(3) refers to "the date on which the right asserted was initially recognized by the Supreme Court." As the court below explained, the use of the term "facts" in subsection (4) "is in contrast to those other subsection[s'] use of 'judgments' and 'rights,' two legal results distinct from historical facts." Pet. App. 13a. Accord Brackett, 270 F.3d at 68-69.

Permitting a prisoner to file a Section 2255 motion to reopen his federal sentence years after his conviction became final, as petitioner sought to do in this case, would undermine the purposes Congress sought to achieve in enacting the AEDPA and its limitation period. There is "no doubt" that Congress enacted the AEDPA "to further the principles of comity, finality, and federalism." Williams v. Taylor, 529 U.S. 420, 436 (2000). Consistent with that intent, Congress established a one-year limitation period that "quite plainly serves the well-recognized interest in the finality

of * * * judgments" by "reduc[ing] the potential for delay on the road to finality" through reasonable "restrict[ions] [on] the time that a prospective federal habeas petitioner has in which to seek federal habeas review." Duncan v. Walker, 533 U.S. 167, 179 (2001). The limitation period serves important institutional interests by "promot[ing] judicial efficiency and conservation of judicial resources, safeguard[ing] the accuracy of * * * judgments by requiring resolution of constitutional questions while the record is fresh, and lend[ing] finality to * * * judgments within a reasonable time." Acosta v. Artuz, 221 F.3d 117, 123 (2d Cir. 2000).

Contrary to petitioner's contention, the court of appeals' interpretation of paragraph 6(4) does not "ignore the effect" of state-court judgments invalidating prior state convictions. Pet. 16. Like other courts of appeals, see, e.g., United States v. LaValle, 175 F.3d 1106, 1108 (9th Cir. 1999); United States v. Pettiford, 101 F.3d 199, 201 (1st Cir. 1996); United States v. Cox, 83 F.3d 336, 339 (10th Cir. 1996), the Eleventh Circuit has held that a defendant who successfully challenges a prior conviction in state court may seek relief under Section 2255 from a federal sentence that was enhanced on the basis of the prior conviction, see United States v. Walker, 198 F.3d 811, 813-814 (11th Cir. 1999). Requiring defendants to raise challenges to their state convictions promptly, however, does not subvert principles of

comity and federalism, as petitioner contends (Pet. 14-16). To the contrary, permitting defendants to delay challenges to their state-court convictions "until the state ha[s] destroyed the trial or plea records, * * * [r]ather than affording respect and finality to state proceedings," would unduly undermine the finality of state convictions. Brackett, 270 F.3d at 70.

2. Petitioner is also mistaken in his contention (Pet. 18) that the court of appeals' decision conflicts with this Court's decisions in Custis v. United States, 511 U.S. 485 (1994), and Daniels v. United States, 532 U.S. 374 (2001). In Custis, the Court held that, in the absence of express statutory authorization, a defendant may not collaterally attack prior state convictions in a federal sentencing proceeding, unless the convictions are shown to have been uncounseled in violation of Gideon v. Wainwright, 372 U.S. 335 (1963). See 511 U.S. at 490-497. The Court noted that a defendant who successfully attacks his prior convictions in state court or through federal habeas corpus review "may then apply for reopening of any federal sentence enhanced by the state sentences," but "express[ed] no opinion on the appropriate disposition of such an application." Id. at 497. In Daniels, the Court held that a federal defendant whose sentence was enhanced based on a prior state conviction that has not been invalidated may not challenge the prior conviction in a Section 2255 proceeding (except for a preserved claim of a Gideon violation). See 532 U.S. at 382. The

Court noted that the defendant "may pursue any channels of direct or collateral review still available to challenge his prior conviction," and if successful, "may then apply for reopening of his federal sentence," but the Court again "express[ed] no opinion on the appropriate disposition of such an application." Ibid.

The court of appeals' decision is consistent with Custis and Daniels because, while those decisions require a recidivist defendant to attack his prior convictions in state court before seeking to challenge his federal sentence in a proceeding under Section 2255, neither decision addresses the time limits that would apply to such a challenge or suggests that the challenge would not be subject to the ordinary procedural rules governing collateral review. As the court of appeals correctly observed, Custis and Daniels "merely outline[] the procedure that a federal prisoner must follow to bring an indirect attack on his federal sentence"; they "do[] not speak to the time limits that apply." Pet. App. 17a.

3. While it does not conflict with any decision of this Court, the court of appeals' decision, like the First Circuit's decision in Brackett, does conflict with the Fourth Circuit's decision in Gadsen. In Gadsen, the Fourth Circuit held that the "relevant 'fact'" under paragraph 6(4) of Section 2255 "is the fact that [the prisoner's] prior state conviction has been conclusively invalidated," 332 F.3d at 227, and that a Section 2255 motion is

therefore timely if it is filed within a year of the date on which the prior state conviction is vacated. In Brackett, by contrast, the First Circuit, like the Eleventh Circuit here, held that "the operative date" under paragraph 6(4) "is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction." 270 F.3d at 68. Despite the conflict, it would be premature for the Court to grant certiorari at this time.

While the First and Eleventh Circuits disagree with the Fourth Circuit's interpretation of the limitations provision of Section 2255, there is reason to believe that they agree with the Fourth Circuit's ultimate conclusion that the Section 2255 motion in Gadsen was timely under that provision. In the decision below the Eleventh Circuit explicitly stated, and in Brackett the First Circuit suggested, that a Section 2255 motion under the circumstances that were present in Gadsen would be timely on the basis of equitable tolling, which is available when a prisoner has acted diligently in pursuing his claim and the delay in filing a Section 2255 motion was a result of an extraordinary circumstance beyond his control. See Pet. App. 19a-23a; Brackett, 270 F.3d at 71. The court below stated that "on the facts of Gadsen [it] would ultimately reach the same result as [the Fourth Circuit] by allowing that [defendant] equitable tolling." Pet. App. 22a. And

while the First Circuit in Brackett could not have commented on Gadsen, which had not yet been decided, it did say that the defendant in Brackett was "no candidate for equitable tolling." 270 F.3d at 71.

The defendant in Gadsden filed a habeas corpus petition in state court less than a year after he was convicted there and more than a year before his federal conviction became final; his Section 2255 motion was delayed because it took more than three years for the state courts to resolve his challenge. 332 F.3d at 225-226, 228. Petitioner, in contrast, challenged his convictions in state court more than eight years after he was convicted there and almost two years after his federal conviction became final, Pet. App. 8a-9a, and the defendant in Brackett challenged his convictions in state court more than six years after he was convicted there and nearly four years after his federal conviction became final, 270 F.3d at 62-63. Thus, unlike the defendant in Gadsen, both petitioner and the defendant in Brackett "made no * * * attempt to act diligently," Pet. App. 20a, and instead "sat on [their] hands for a great many years," 270 F.3d at 71.

Moreover, unlike the state court in Gadsen, which vacated the conviction because the defendant "did not have a full understanding of the consequences of his plea," 332 F.3d at 225, the state courts in this case and in Brackett did not hold that the prior convictions were constitutionally invalid. The state court in this

case merely found that, because the state had failed to produce transcripts of the guilty-plea proceedings, the record did not "show an affirmative waiver of [petitioner's] right to an attorney," Pet. App. 45a, and the state court in Brackett vacated the convictions because the state prosecutor "agree[d] to vacate the * * * conviction[s] years after the records of [the] conviction[s] were destroyed," 270 F.3d at 71. For this reason, too, there is "nothing about [t]his case [or Brackett that] suggests that the equities are in [the defendant's] favor." Ibid.

Since the result in Gadsen would likely have been the same in the First and Eleventh Circuits (even if the reasoning would have been different), the conflict in the circuits will probably not result in dissimilar treatment of at least one class of prisoners: those who, like the defendant in Gadsen, challenge a state conviction in a timely manner and obtain a ruling that the conviction was unconstitutional. It appears that only one case of this type has been considered at the appellate level to date. If the Fourth Circuit extends Gadsen to every prisoner whose state-court conviction is vacated more than a year after his federal conviction becomes final, without regard to the circumstances of the case, the conflict will likely result in dissimilar treatment of another class of prisoners: those who do not challenge the state conviction until many years later or who obtain vacatur of the conviction only because the records have been destroyed or the

prosecutor has no interest in defending a conviction for which the sentence has already been served. There is some language in Gadsen, however, that suggests that the Fourth Circuit might not apply the decision to that class of prisoners. For example, the court appears to have found it significant that the delay in obtaining vacatur of the state-court conviction in that case "was due to the state court system's decisionmaking process, something obviously not under [the defendant's] control." 332 F.3d at 228. A paragraph later, moreover, the court summed up its conclusion by stating that, "in cases like Gadsen's, the federal statute of limitations begins running when the state court conviction is conclusively invalidated." Id. at 229 (emphasis added).

Thus, while there is a circuit conflict on the question presented in this case, the conflict is not sufficiently developed to warrant the exercise of the Court's certiorari jurisdiction at this time. The applicability of paragraph 6(4) of 28 U.S.C. 2255 to motions based on the vacatur of a state-court conviction has been addressed by only three courts of appeals; two of the three decisions were issued within the last 13 months; it is possible that the minority circuit will read its decision narrowly in future cases, such that the significance of the conflict will diminish; and the minority circuit has not yet had the opportunity to interpret its decision in a published opinion. For these reasons, "further consideration * * * of the problem by [the lower] courts

[may] enable [this Court] to deal with the issue more wisely at a later date." McCray v. New York, 461 U.S. 961, 962 (1983) (opinion of Stevens, J., respecting the denial of certiorari).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

CHRISTOPHER A. WRAY
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JULY 2004

(6)

Nos. 03-9629 and 03-9685

Supreme Court, U.S.
FILED
2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DERRICK RIVERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ROBERT JOHNSON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

WHEN A STATE COURT CONVICTION IS USED TO ENHANCE A FEDERAL SENTENCE, SHOULD THE ONE-YEAR STATUTE OF LIMITATIONS IN 28 U.S.C. § 2255 COMMENCE WHEN THE STATE CONVICTION IS CONCLUSIVELY INVALIDATED?

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Murphy, The Honorable Harold L. – United States District Judge

Pope, Warren B. – Counsel for Petitioner Johnson, Jr.

Owens, The Honorable Wilbur D. – United States District Judge

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INTEREST OF THE AMICUS CURIAE[1]

This amicus brief is written by the Georgia Association of Criminal Defense Lawyers (hereinafter GACDL) which is a non-profit corporation organized in 1974 and by the National Association of Criminal Defense Lawyers (hereinafter NACDL) which is a District of Columbia non-profit corporation.

GACDL has a membership that is comprised of more than fifteen hundred (1,500) attorneys licensed to practice law in the State of Georgia. GACDL is the only Georgia association of public and private defense lawyers. The association is dedicated to the preservation and improvement of our adversary system of justice, and a reasoned and informed advancement of criminal procedure and jurisprudence. The affiliates and leadership of the association believe GACDL represents the concerns and interest of those lawyers who undertake the awesome responsibility of defending citizens accused of crimes in the State of Georgia.

Article II of the by-laws of the GACDL defines the purposes of the association. Subsection (a) expresses the association's commitment to the defense of fundamental civil liberties assured by the state and federal Constitutions, in addition to the association's concern with the fair and impartial administration of criminal justice. It confirms the association is devoted "[t]o protect and insure by

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[1] The Parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk of this Court. This brief was not written in whole or in part by counsel for a party. Amici and their counsel were not compensated in any way.

rule of law, those individual rights guaranteed by the Georgia and Federal Constitutions in criminal cases; to resist the efforts which are constantly being made to curtail such rights; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice in the common good."

The amicus curiae committee of GACDL is a standing committee which submits amicus briefs in state and federal appellate courts on issues deemed to be of significance to defense lawyers throughout the State of Georgia. The amicus curiae committee requested and authorized the undersigned to file this brief.

The NACDL was founded over 40 years ago and now has a membership including more than 10,000 attorneys with members in every state. NACDL has some 80 state and local affiliates which permit it to speak on behalf of over 30,000 professional defenders. The American Bar Association recognizes NACDL as an affiliate and accords it representation in its House of Delegates. NACDL is widely recognized as the voice of the criminal defense bar. NACDL was founded to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties, as guaranteed by the original Constitution and the Bill of Rights. One of its particular concerns is the availability of effective judicial remedies, including appellate review, for those our system has failed, and for whom collateral review thus provides the only avenue for seeking justice.

The NACDL national amicus curiae committee requested and authorized the undersigned to file this brief.

SUMMARY OF THE ARGUMENT

Petitioners have each filed a Petition for Writ of Certiorari,[2] challenging a lower court's determination that their 28 U.S.C. § 2255 motions were time-barred. Specifically, in unrelated cases, Petitioners were convicted of federal offenses, and their sentences were enhanced based on prior state convictions. Subsequently, Petitioners successfully challenged their prior state convictions and then filed Section 2255 motions to have their enhanced sentences corrected to reflect the vacatur.

In each case, the government argued that the vacatur[3] was not a "fact" with the meaning of 28 U.S.C. § 2255 ¶6(4); thus, Petitioners were time-barred by the one-year statute of limitations. On August 5, 2003, in a divided panel decision, the Eleventh Circuit affirmed the denial of Petitioner Johnson's Section 2255 action as being untimely, reasoning that it was not brought within one year "of the date on which the facts supporting the claim or claims presented could have been discovered . . . " *Johnson v. United States*, 340 F.3d 1219, 1226 (11th Cir. 2003) (citation omitted). In accordance with the *Johnson* decision, the Eleventh Circuit affirmed the lower court's

[2] Petitioner Rivers' Petition for Writ of Certiorari was docketed April 1, 2004; and Petitioner Johnson's Petition for Writ of Certiorari was docketed April 6, 2004.

[3] Vacatur, meaning the setting aside of the prior conviction.

determination that Petitioner Rivers was time-barred for the same reason.

The two other Circuits to have addressed this issue are hopelessly split. In *United States v. Gadsen*, 332 F.3d 224 (4th Cir. 2003), the Fourth Circuit held that the setting aside of a prior conviction is a "fact" within the meaning of 28 U.S.C. § 2255 ¶6(4). Comparatively, in *Brackett v. United States*, 270 F.3d 60 (1st Cir. 2001), the First Circuit held that the setting aside of a prior conviction is not a "fact" within the meaning of 28 U.S.C. § 2255 ¶6(4).

Amici submits that the language and spirit of the limitations statute dictate a result in accordance with *Gadsen*, *supra*. In pertinent part, 28 U.S.C. § 2255 ¶6 prescribes that the one-year limitations period begins from the latest of, "(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." It is the "fact" of the vacatur which gives a federal inmate the legal legs to challenge the enhanced federal sentence. This construction is also consistent with existing Supreme Court precedent; provides defendants with the remedy which the Supreme Court has promised; honors the most basic tenets of fairness; and prevents the filing of premature and meritless Section 2255 motions.

ARGUMENT

I. WHEN A STATE COURT CONVICTION IS USED TO ENHANCE A FEDERAL SENTENCE, THE ONE-YEAR STATUTE OF LIMITATIONS OF 28 U.S.C. § 2255 SHOULD BE INTERPRETED TO COMMENCE WHEN THE STATE COURT CONVICTION IS CONCLUSIVELY INVALIDATED.

In *Johnson v. United States*, 340 F.3d 1219 (11th Cir. 2003), the Eleventh Circuit affirmed the lower court's determination that Petitioner Johnson's Section 2255 action was time-barred. Citing the *Johnson* decision, the Eleventh Circuit affirmed the denial of Petitioner Rivers' Section 2255 action as being time-barred for the same reason. *See* Petitioner Rivers' Petition for Writ of Certiorari, Appendix A.

Amicus Curiae respectfully requests that the Court grant Certiorari for each Petitioner to address 28 U.S.C. § 2255 ¶6(4) and to rule in favor of Petitioners for the following reasons:

(1) Such a ruling is consistent with precedent of the United States Supreme Court and the language of 28 U.S.C. § 2255 ¶6(4);

(2) Such a ruling would provide those defendants, who reasonably relied on Supreme Court precedent, with the promised remedy;

(3) Such a ruling furthers the ends of justice by preventing defendants from serving substantially increased sentences based upon invalid state convictions; and

(4) Such a ruling would prevent the premature filing of meritless 2255 motions.

II. UNITED STATES SUPREME COURT PRECEDENT HAS INVITED DEFENDANTS TO CHALLENGE THEIR ENHANCED FEDERAL SENTENCES BY MAKING A SUCCESSFUL CHALLENGE TO THE PRIOR STATE CONVICTION IN A COLLATERAL PROCEEDING AND THEN BY FILING A 2255 MOTION TO CORRECT THE ENHANCED SENTENCE.

In *Custis v. United States*, 511 U.S. 485, 497, 114 S. Ct. 1732, 128 L.Ed.2d 517 (1994), the Court held that federal defendants could not attack the validity of prior convictions used to enhance their federal sentences at sentencing. The Court in *Custis* directed defendants to attack their prior convictions in separate proceedings and, if successful, to "then apply for reopening of any federal sentence enhanced by the state sentences." *Id.* at 497.

Recently and since the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the Court in *Daniels v. United States*, 532 U.S. 374, 121 S. Ct. 1578, 149 L.Ed.2d 590 (2001), held that a federal prisoner may not challenge a federal sentence through a Section 2255 action on the ground that a prior state conviction was unconstitutionally obtained. Instead, the Court reasoned that the defendant should "pursue any channels of direct or collateral review still available to challenge his prior conviction" and "[i]f any such challenge to the underlying conviction is successful, the defendant may then apply for reopening of his federal sentence." *Id.* at 382.

The collective instruction of *Custis* and *Daniels* is that federal defendants may not challenge the validity of their prior state convictions used to enhance their federal sentences; after sentencing, they may challenge the validity of their prior state conviction in a collateral proceeding; and if successful, they may initiate a Section 2255 action to correct their enhanced federal sentence. Notably, *Custis* and *Daniels* did not place any time constraints upon this procedure. Accordingly, the only reasonable reading of *Custis* and *Daniels* is that a federal prisoner, who avails himself of the Court's invitation to challenge a prior state conviction, is not thereafter barred merely because the challenge was not completed within one year.

III. THE DECISIONS IN *JOHNSON* AND *BRACKETT* PUNISH DEFENDANTS WHO HAVE REASONABLY RELIED ON THE PROCEDURE OUTLINED IN *CUSTIS* AND *DANIELS*.

As discussed above, Supreme Court precedent holds that federal defendants may not challenge their prior state conviction, being used to enhance their sentence, at their federal sentencing. Instead, the Court instructs defendants to make these challenges in separate proceedings after sentencing and, if successful, to file a Section 2255 motion to vacate, set aside, or correct sentence. To date, the Court has not imposed a time constraint on this procedure.

Under 28 U.S.C. § 2255, a prisoner in custody under sentence of a federal court may petition the court that imposed the sentence to vacate, set aside or correct the sentence subject to a one-year period of limitations, which runs from the latest of:

(1) The date on which the judgment of conviction becomes final;

(2) The date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) The date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) The date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 ¶6 (emphasis added).

The only construction of 28 U.S.C. § 2255 ¶6(4) that is consistent with the Supreme Court precedent of *Custis* and *Daniels* is the interpretation outlined by the United States Court of Appeals for the Fourth Circuit in *United States v. Gadsen*, 332 F.3d 224 (2003). In *Gadsen*, the Fourth Circuit held that:

> The plain text of § 2255 and the logic of the Supreme Court's opinion in *Daniels* point to the same conclusion: in cases like Gadsen's, the federal statute of limitations begins running when the state court conviction is conclusively invalidated.

Id. at 228-229.

To hold that the one-year statute of limitations begins before the state conviction is conclusively invalidated would contravene the Supreme Court's rulings in *Custis* and *Daniels*. Although a defendant has control over when to initiate the challenge in state court, the defendant has no control over the court's subsequent actions in resolving the matter. The state court could take over one year to invalidate the defendant's prior state conviction, and the appeal of that ruling could easily exceed the one-year period.

The Fourth Circuit in *Gadsen*, *supra* correctly allocated control over the one-year limitations period to the defendant by holding that the one-year period commences when the state court conviction is conclusively invalidated. Any other result would subjugate defendants' rights as outlined in *Custis* and *Daniels* to the vagaries of a timeline entirely beyond their control.

The court in *United States v. Cavallaro*, 2000 WL 230225 (D. Me. 2000), provided a logical framework to explain 28 U.S.C. § 2255 ¶6(4). The "claim" is the claim that the defendant is not a career offender. *Id.* The "fact" supporting this claim is the fact that the prior state conviction, once used to support the assertion that the defendant was a career offender, no longer exists. *Id.* This "fact" was not "discoverable" until the date that the state conviction was conclusively invalidated. *Id.*

In contrast, the United States Court of Appeals for the First Circuit and Eleventh Circuit offer a starker interpretation of 28 U.S.C. § 2255 ¶6(4). Particularly, in *Brackett*, the First Circuit held:

> We hold that the operative date under § 2255(4) [sic] is not the date the state conviction was vacated,

> but rather the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction.

Brackett v. United States, 270 F.3d at 68. Similarly, in *Johnson*, the Court held:

> Because an indirect collateral attack is predicated on a successful challenge to prior state convictions used to enhance the federal sentence, it is at least plausible to argue that a petitioner has one year from the date his prior state convictions were set aside, under § 2255 ¶6(4).
>
> Common sense, however, dictates that we distinguish legal propositions and results from the "facts" referred to in § 2255.

Johnson v. United States, 340 F.3d at 1233. The *Johnson* Court went further, characterizing the vacatur of a prior state conviction as a "court action" and not a "fact" that is "discoverable." *Id.*

But the apparent logic behind *Johnson* and *Brackett* utterly evades those defendants who relied on *Custis* and *Daniels*. Even the *Brackett* Court acknowledged the predicament now facing such defendants:

> . . . the net result of *Custis* and *Daniels* was to leave federal prisoners in a practical bind. They could not bring a § 2255 petition to federal court until they had gotten the state convictions vacated and they had only one year in which to accomplish that from the date of federal conviction – a daunting task.

Brackett v. United States, 270 F.3d at 67. "It would be an illogical, if not cruel, gesture for the Supreme Court to

invite prisoners to attack their predicate convictions and then inform them that their efforts must go for naught and their enhanced sentences must stand." *United States v. Payne,* 894 F. Supp. 534, 543 (D. Mass. 1995). To avoid a miscarriage of jurisprudence and justice, the Court should grant Certiorari and protect those defendants who have reasonably relied upon the procedure set forth by the United States Supreme Court.

IV. UNLESS THE COURT GRANTS CERTIORARI, FEDERAL PRISONERS WILL RECEIVE ENHANCED SENTENCES, EVEN LIFE SENTENCES, BASED ON PRIOR STATE CONVICTIONS WHICH THEY DID NOT COMMIT OR WHICH WERE UNCONSTITUTIONALLY OBTAINED.

Other courts have rejected the interpretation of 28 U.S.C. § 2255 ¶6(4) as enunciated by the First and Eleventh Circuit and, instead, followed the interpretation announced in *United States v. Gadsen, supra*. *See United States v. Hicks*, 286 F. Supp.2d 768 (E.D. La. 2003); *Duran v. United States*, 2002 WL 867864 (S.D. N.Y. 2002); *United States v. Hoskie*, 144 F. Supp.2d 108 (D. Conn. 2001); *United States v. Cavallaro*, 2000 WL 230225 (D. Me. 2000). In doing so, these courts have avoided a regime in which federal prisoners serve substantially longer sentences, even life sentences, based on a prior state conviction that was subsequently vacated. As Judge Roney stated in his dissent in *Johnson*, *supra*:

> Without question, if the rule announced in this decision and in *Brackett* is consistently applied, in some circuits there will be defendants serving time in federal prison under a federal sentence

> based upon conviction of a state crime that the state court has authoritatively held the defendant unquestionably did not commit, who would be barred from relief, while in other circuits relief from such imprisonment will be readily available.

This inequity should not be reduced to law; and the Court can provide the needed guidance by granting Certiorari for Petitioner Johnson and Petitioner Rivers.

V. THE INTERPRETATION OF 28 U.S.C. § 2255 ¶6(4) IN *BRACKETT* AND *JOHNSON*, IF ALLOWED TO STAND, WILL CAUSE THOUSANDS OF MERITLESS SECTION 2255 MOTIONS TO DELUGE FEDERAL COURTS.

Human cost aside, the decisions in *Johnson* and *Brackett*, if allowed to stand, will cause a deluge of meritless § 2255 motions undoubtedly generating unnecessary work for clerks, judges and their support staff, and federal prosecutors. The reason is simple: To comply with the one-year limitations period, federal prisoners will have to file Section 2255 motions while the collateral attacks on their prior state convictions are still pending. For federal practitioners, prudence and the fear of ineffective claims would require erring on the side of filing such a motion promptly after sentencing. Predicting these problems, the *district court* in *Brackett v. United States*, 206 F. Supp.2d 183, 186 (D. Mass. 2002), explained:

> Thus, rather than have failure in the state court act as a natural screen, the courts' approach results in thousands of meritless petitions being filed – each of which requires a case file be opened, orders issued, papers docketed, and the file stored. . . . The net result is that the burden on the courts imposed by habeas corpus petitions is likely to increase, not decrease, as the courts continue to wrestle with AEDPA.

To prevent an unnecessary burden to the federal judiciary, the Court should adopt the Fourth Circuit's interpretation of 28 U.S.C. § 2255 ¶6(4).

CONCLUSION

Amicus Curiae respectfully request the Court to grant Certiorari to Petitioner Rivers and to Petitioner Johnson. The issue presented here is critically important to an unknown number of federal inmates, to any number of future defendants, to all federal practitioners, and to the federal judicial system itself. The Circuits that have addressed the issue are divided beyond reconciliation; and it is merely a matter of time before this issue is before the Court again. If justice delayed is justice denied, the Court will surely spare federal inmates and our judicial

system the costs of unjust imprisonment by granting Certiorari now.

Respectfully submitted,

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(3)

No. 03-9685

Supreme Court, U.S.
FILED
NOV 12 2004
OFFICE OF THE CLERK

In the Supreme Court of the United States

ROBERT JOHNSON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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Petition for Certiorari Filed March 22, 2004
Petition for Certiorari Granted September 28, 2004

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United States District Court
for the Middle District of Georgia
Criminal Docket for Case No. 94-CR-7-4

1	03/18/94	SEALED INDICTMENT as to Charles Kendrick (1) count(s) 1, 3, 14, 15, 16, 18, 19; Johnny Allen (2) count(s) 1, 6, 11, 12, 15, 17, 18, 19; Lawrence Carter (3) count(s) 1, 3, 7, 13, 14, 19; Robert Johnson (4) count(s) 1, 2, 4, 9, 13, 16; Timothy Jennings (5) count(s) 1, 5, 8, 10; Terrance Kendricks (6) count(s) 1, 19 (np) [Entry date 03/22/94]
114	06/02/94	PLEA entered by Robert Johnson Jr. Court accepts plea. Guilty: Robert Johnson (4) count(s) 2 (np) [Entry date 06/06/94]
141	11/29/94	JUDGMENT as to Robert Johnson (4) count(s) 2: 188 mos impri; 5 yrs supervised release not to possess guns or dangerous weapons; urinalysis testing; unable to pay fine; $50 mandatory assessment fee (Signed by Judge Wilbur D. Owens Jr.) (np) [Entry date 12/05/94]
144	12/07/94	NOTICE OF APPEAL by Robert Johnson (4) count(s) 2 (np) [Entry date 12/12/94]

158 01/25/95 TRANSCRIPT (1 Vol) filed in case as to Robert Johnson Jr. for dates of 11/18/94; Sentencing Hearing held before WDO in Macon, GA (Ct. Rptr.: Frances Roquemore) (np) [Entry date 01/25/95]

-- 02/13/95 PRESENTENCE INVESTIGATION REPORT (Sealed) as to Robert Johnson Jr. (np) [Entry date 02/15/95]

163 02/01/96 JUDGMENT of USCA (certified copy) as to Robert Johnson Jr. Re: [144-1] appeal affirming judgment/order Robert Johnson (4) count(s) 2 (np) [Entry date 02/01/96]

169 05/01/96 ORDER as to Robert Johnson Jr., Denying Certiorari (Supreme Court, Washington, DC) (np) [Entry date 05/01/96]

173 04/25/97 MOTION by Robert Johnson Jr. to Extend Time to file 2255 Motion (np) [Entry date 05/06/97]

174 05/12/97 ORDER as to Robert Johnson Jr. denying without prejudice [173-1] motion to Extend Time to file 2255 Motion as to Robert Johnson (4) (Signed by Judge Wilbur D. Owens Jr.) (np) [Entry date 05/13/97]

180 02/15/01 MOTION by Robert Johnson Jr. to Vacate under 28 U.S.C. 2255 (7:01-CV-14-WDO) (np) [Entry date 02/15/01]

181 03/06/01 Order to Respond as to Robert Johnson Jr. re: [180-1] motion to Vacate under 28 U.S.C. 2255 (7:01-CV-14-WDO) Response due on 5/7/01 for USA; Reply to Response due 5/15/01 for Robert Johnson Jr. (np) [Entry date 03/06/01]

182 04/27/01 RESPONSE by USA as to Robert Johnson Jr. re [180-1] motion to Vacate under 28 U.S.C. 2255 (7:01-CV-14-WDO) (np) [Entry date 05/07/01]

184 05/11/01 REPORT AND RECOMMENDATIONS of Mag. Judge G. M. Faircloth as to Robert Johnson Jr. Re: to Deny [180-1] motion to Vacate under 28 U.S.C. 2255 (7:01-CV-14-WDO); Motion no longer referred Objections to R and R due by 5/29/01 for Robert Johnson, Jr. (np) [Entry date 05/11/01]

185 06/01/01 OBJECTION as to Robert Johnson Jr. Re: [184-1] report and recommendations (np) [Entry date 06/01/01]

186 08/01/01 ORDER as to Robert Johnson Jr. denying [180-1] motion to Vacate under 28 U.S.C. 2255 (7:01-CV-14-WDO) as to Robert Johnson (4) (Signed by Judge Wilber D. Owens Jr.) (np) [Entry date 08/07/01]

187 08/07/01 JUDGMENT on 2255 Motion to Vacate (7:01-CV-14-WDO) as to Robert Johnson Jr. (np) [Entry date 08/07/01]

191	10/04/01	ORDER as to Robert Johnson Jr. denying [188-1] motion for Certificate of Appealability as to Robert Johnson (4) (Signed by Judge Wilbur D. Owens Jr.) (np) [Entry date 10/04/01]
193	01/23/02	USCA Order as to Robert Johnson Jr. re: Granting Deft's Motion for Certificate of Appealability only on the issue of whether the District Court determined the deft's 2255 motion was filed untimely (np) [Entry date 01/25/02]

United States Court of Appeals for the Eleventh Circuit
Docket No. 01-14830-AA

02/14/02	Appellant's Brief Filed: Appellant-Johnson, Robert Jr. (ProSe)
02/26/02	BR10 (Notice to Appellee of Filing of Pro Se Brief) issued. cc: Johnson, Robert, Jr. To: Lynch, John Larkin
03/19/02	Appellee Brief Filed: Appellee-United States of America (Atty: John Larkin Lynch)
03/28/02	Reply Brief Filed: Appellant-Johnson, Robert Jr. (ProSe)
08/12/02	Supplemental Appellant Brief: Appellant-Johnson, Robert Jr. (Atty: Courtland L. Reichman)
--	Appellee Brief Filed: (Atty: John L. Lynch) - Suppl. brief
--	Judgment Entered
08/05/03	OPIN1 (Opinion - Issuance) issued. c: Hagen, Jessica Joan-Marie; c: Lynch, John L.; c: Pope, Benjamin Warren; c: Reichman, Courtland L.
08/28/03	Petition for Rehearing En Banc

--	Petition for Rehearing En Banc is DENIED. RB dissented from denial of rehearing en banc. (PUBLISHED)
--	Mandate Issued
01/14/04	MDT1 (Letter issuing mandate) issued. To: Gregory J. Leonard; c: Faircloth, G. Mallon; c: Hagen, Jessica Joan-Marie; c: Lynch, John L.; c: Pope, Benjamin Warren; c: Reichman, Courtland L.
03/22/04	Notice of Filing Certiorari (SC# 03-9685): (Atty: Benjamin Warren Pope)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-9402
Non-Argument Calendar

D. C. Docket No. CR-94-7-VAL-WDO

[Filed December 22, 1995]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
versus	)
ROBERT JOHNSON JR., a/k/a "Rootman", Defendant-Appellant.	)

Appeal from the United States District Court
for the Middle District of Georgia

Before TJOFLAT, Chief Judge, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

Following appellant's plea of guilty to distribution of cocaine base, the district court sentenced appellant as a career offender to a prison term of 188 months. Appellant seeks the vacation of his sentence on the ground that the district court, in concluding that he was a career offender, considered prior state court convictions that, according to appellant, were

based on guilty pleas entered by appellant without a valid waiver of his constitutional rights.

Appellant raises this objection for the first time on appeal. At sentencing, when the district court asked appellant whether he had any objections to the sentence the court imposed, he stated that he had none. Because the district court's fact findings on the career offender issue are not clearly erroneous and because our refusal to consider the objection appellant now raises would not result in manifest injustice, we do not consider whether, as appellant contends, state court convictions relied on by the district court were obtained in violation of his constitutional rights.[1]

AFFIRMED.

---

[1] We note in passing that, should appellant obtain at some future date the vacation of the state court conviction in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide.

IN THE SUPERIOR COURT OF WAYNE COUNTY
STATE OF GEORGIA

CIVIL ACTION NO.: 98-CV-086
HABEAS CORPUS

[Filed October 24, 2000]

ROBERT JOHNSON, JR.	)
Petitioner,	)
	)
vs.	)
	)
THE STATE OF GEORGIA,	)
Respondent.	)
	)

ORDER

Petitioner, after being sentenced in Federal Court to an enhanced sentence because of certain state convictions, filed his Petition For Writ of Habeas Corpus alleging that his pleas in seven cases in Cook County Superior Court were not voluntary in that he did not knowingly, intelligently and voluntarily waive his right to counsel at the hearing on the entry of his guilty pleas. The cases that were challenged by Petition were numbered 83F-9, 88F-32, 88M-43, 89F-122, 90F-383, 92F-36 and 93F-148 filed in Cook County Superior Court.

Petitioner, in his Petition, filed copies of the plea petitions that accompanied the entry of his pleas. These plea petitions contained questions about his waiver of the presence and use of an attorney.

The State responded denying the allegations but have not filed any further transcripts of the hearings which would support their position.

This Court finds that the record in these cases does not show an affirmative waiver of his right to an attorney. See Clowers v. State, 272 Ga. 463 (2000) and Bazemore v. State, Georgia Supreme Court docket number S00A1100, decided October 10, 2000.

IT IS HEREBY ORDERED that Petitioner's Petition For Writ of Habeas Corpus is hereby **GRANTED** and the convictions in the above-cited cases are hereby reversed.

SO ORDERED, this 24th day of Oct., 2000.

/s/ Robert L. Scoggin
Robert L. Scoggin
Senior Judge
Superior Courts of Georgia

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

CASE NO. 7:01-CV- 14 (WDO)
28 U.S.C. § 2255

CASE NO. 7:94-CR-07 (WDO)

[Filed May 11, 2001]

ROBERT JOHNSON, JR., PETITIONER,	)
vs.	)
UNITED STATES OF AMERICA, RESPONDENT.	)

REPORT AND RECOMMENDATION

Petitioner Johnson was charged by Indictment returned in this court on March 18, 1994 with Conspiracy to Possess Cocaine Base With Intent to Distribute in violation of 21 U.S.C. § 846 i/c/w 21 U.S.C. § 841(a)(1), and with five counts of Distribution of Cocaine Base in violation of 21 U.S.C. § 841(a)(1). On June 2, 1994, in exchange for certain considerations from the Government, Petitioner entered into a Plea Agreement (Tab 113) and pled guilty to Count Two as contained in the Indictment. He was sentenced by this court on November 18, 1994 to serve 188 months imprisonment. (Tab 136.) Petitioner appealed his sentence to the Eleventh Circuit Court of Appeals where the same was affirmed on February 1, 1996. (Tab 163.) Petitioner applied to the

Supreme Court for a writ of certiorari which was denied by that Court on April 24, 1996. (Tab 169.) Almost five years thereafter, on February 13, 2001, Petitioner filed the instant Section 2255 Motion to Vacate Set Aside or Correct his sentence. (Tab 180.)

THE TIME-BAR ISSUE

The Anti-Terrorism and Effective Death Penalty Act (AEDPA) codified as part of 28 U.S.C. § 2255 became effective on April 24, 1996. The relevant portion of 28 U.S.C. § 2255 is as follows:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-
>
> (l) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Until March of this year, 2001, the Eleventh Circuit Court of Appeals had not addressed at what point a conviction becomes final in cases where a defendant is unsuccessful on

appeal and thereafter files a petition for a writ of certiorari with the Supreme Court. In *Washington v. United States,* 2001 WL 237243 (11th Cir. 2001), the Court joined the other appellate courts which had ruled on the issue and held that such a conviction becomes final on the day the Supreme Court denies a defendant's certiorari petition, and the AEDPA's statute of limitations in light of Rule 6(a), Fed. R.Civ. P., starts the period of limitations running on the day following the Supreme Court's decision. *Id.* Therefore, the AEDPA one-year period of limitation began to run on Petitioner's right to file his Section 2255 Motion to vacate his sentence on April 24, 1996 and, unless it was tolled, would have expired on April 24, 1997. 28 U.S.C. § 2255.

The Eleventh Circuit Court of Appeals has held that the AEDPA'S one-year limitations period for motions to vacate, set aside, or correct sentences may be equitably tolled when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence. *Sandvik v. United States,* 177 F. 3d 1269, (11th Cir. 1999). *See Irwin v. Department of Veteran's Affairs,* 498 U.S. 89, 95-96, 111 S. Ct. 453, 457 (1990) "(Federal Courts) have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."

PETITIONER'S CONTENTION

What does Petitioner contend should toll the running of the one-year period of limitations before April 24, 1997 (the deadline) until he eventually filed his Motion on February 13, 2001? Petitioner asserts as his sole ground for relief in the instant petition that he suffered a *due process* violation in that his sentence was based on seven invalid prior state convictions used to categorize him as a career offender under

the Sentencing Guidelines. Petitioner appealed his sentence to the Eleventh Circuit Court of Appeals where he raised the issue of his prior state convictions as being entered uncounseled and without waiver of his constitutional rights, and therefore invalid as a basis for career offender status in his federal sentence.

The Court of Appeals, in an unpublished opinion (Tab 163), refused to consider Petitioner's objection to his sentence as raised for the first time on appeal, but added in a sole footnote:

> We note in passing that, should appellant obtain at some future date the vacation of the state court conviction in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide.

[It is salient to note that the appellate court stated that Petitioner could petition the district court *under 28 U.S.C. § 2255* for the relief he sought there.]

When the sentencing court gives explicit consideration to a defendant's record of previous convictions, which are later conclusively determined to be unconstitutionally invalid, the case should be remanded to the district court for resentencing with reconsideration of the invalid prior sentences. *Tucker v. United States,* 92 U.S. 443, 92 S. Ct. 589, 590 (1972). *See Custis v. United States,* 511 U. S. 485, 114 S. Ct. 1732, 1739 ("If [defendant] is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentence."). *See United States v. Roman,* 989 F.2d 1117, 1120 (11th Cir. 1993) (en banc) (suggesting that the constitution may only require such

collateral review of uncounseled convictions). All of the foregoing authorities preceded 28 U.S.C. § 2255 as amended by the AEDPA.

Petitioner contends that the statutory one-year period within which he had to file his instant Section 2255 motion began to run from October 24, 2000, the date on which the state habeas court reversed his prior state convictions. This may be construed as a claim of newly discovered evidence by which Petitioner seeks to apply section (4) of 28 U.S.C. § 2255: "The limitation period shall run from the ... the date in which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." Petitioner may be claiming surprise.

The issue thus becomes whether Petitioner exercised due diligence in filing his state habeas corpus petition regarding the claim of invalid prior state convictions, in order to meet the time limitation for filing his Section 2255 Motion. It is evident that Petitioner was fully aware of the claimed infirmity of his prior state convictions at the time of the appeal of his sentence to the Eleventh Circuit Court of Appeals, inasmuch as that was the sole issue he raised before that court, which ruled adversely to him on February 1, 1996. He attempted to obtain a writ of certiorari on the Court of Appeals decision. That application was denied by the Supreme Court on April 24, 1996. The fact that the date of the denial of certiorari and the effective date of the AEDPA's period of limitation was the same is purely coincidental. Together they initiate the running of Petitioner's one-year limitation for the filing of his state proceeding challenging the constitutional validity of his state convictions to constitute any equitable tolling of the AEDPA 1-year period of limitation. Petitioner's *due diligence* must be measured from that date,

especially in view of the admonition from the decision of the Eleventh Circuit Court of Appeals. (Tab 163.)

Again, the relevant portion of AEDPA period of limitation is as follows:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-
>
> (l) the date on which the judgment of conviction becomes final; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255. The records of Wayne County Superior Court show, as Petitioner alleges and exemplifies by Exhibit A attached to his Motion, that, by Order of that court, dated October 24, 2000, in Habeas Corpus Action No. 98-CV- 086, Petitioner's convictions in case Nos. 83F-9, 88F-32, 88M-43, 89F-122, 90F-383, 92F-36, and 93F-148 from Cook County Superior Court, were reversed as unconstitutionally uncounseled. However, the official records of Wayne County Superior Court, attached hereto, also disclose that Petitioner's state Habeas Corpus Action No. 98-CV-086 was not filed in that court until February 6, 1998, more than twenty-one (21) months after his sentence became final by the Supreme Court's denial of his application for writ of certiorari, and more than nine (9) months after the expiration of the 1-year AEDPA period of limitations he had to file for collateral relief in this court. Petitioner cannot make a credible argument for due diligence when he waited 21 months to file his state action as suggested to him by the Eleventh Circuit Court of Appeals. While his pleadings may be given liberal

construction, "Liberal construction does not mean liberal deadlines." *Wayne v. Jarvis,* 197 F. 3d 1098, 1104 (11th Cir. 1999). Petitioner's instant Motion to vacate his sentence cannot be said to have been filed *under* [the provisions of] *28 U.S.C. § 2255.* Petitioner's instant Motion to Vacate Set Aside or Correct his sentence is, therefore, time-barred pursuant to the provisions of the AEDPA codified in 28 U.S.C. § 2255, and should be summarily denied.

WHEREFORE, IT IS RECOMMENDED that Petitioner's Motion be DENIED. Pursuant to 28 U.S.C. § 636 (b)(1), the parties may serve and file written objections to this Recommendation with the United States District Judge, WITHIN TEN (I0) DAYS after being served with a copy hereof.

SO RECOMMENDED this 9th day of February in the year 2000.

/s/ G. MALLON FAIRCLOTH
G. MALLON FAIRCLOTH
UNITED STATES MAGISTRATE JUDGE

(Certificate of Service omitted in printing).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

CASE NO. 7:01-CV- 14 (WDO)
28 U.S.C. § 2255

CASE NO. 7:94-CR-07 (WDO)

[Filed August 1, 2001]

ROBERT JOHNSON, JR.,	)
PETITIONER,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
RESPONDENT.	)
	)

ORDER

After full consideration of Petitioner's Motion to Vacate Set Aside or Correct his sentence pursuant to 28 U.S.C. § 2255, the Report and Recommendation of the Magistrate Judge, and Petitioner's Objections to the Magistrate Judge's Recommendation,

IT IS DETERMINED that Petitioner's 1994 sentence in this court became final upon denial of his application for *writ of certiorari* to the U.S. Supreme Court on April 24, 1996, and that despite his success in getting his prior state sentences set aside on October 24, 2000, the AEDPA statute of limitations of 1-year within which he had to file a timely 28 U.S.C. § 2255 Motion to Vacate Set Aside or Correct his

sentence had expired on April 24, 1997. Petitioner had taken no action to toll the statute for a period of 21 months before he filed his state habeas corpus action.

Petitioner cites *United States v. Walker,* 198 F.3d 811, (11th Cir. 1999), which is factually similar, but distinguishable in a very important matter. Walker's federal conviction was affirmed by the 11th Circuit in 1996; his petition for *certiorari* was denied in 1996. In 1997, Walker filed a §2255 motion alleging his enhanced sentence was based upon an unconstitutional state sentence. The district court dismissed Walker's 2255 motion in 1998, ruling that Walker's claim was not ripe as the state sentence had not yet been set aside. Walker filed a state habeas corpus action immediately, and, apparently without contest, the state court vacated Walker's prior state sentence. "Then Walker, pursuant to Section 2255 and Fed.R.Civ.P.60(b), moved for relief from his 1996 ACCA federal sentence, requesting that the district court vacate the enhanced sentence as one of his three state predicate convictions now had been vacated. [FN4] The district court ordered a new PSI ... re-computed without reference to the 1979 (state) conviction. It then granted walker's Section 2255 petition." *Walker,* 198 F.3d at 813.

> FN4. This was ninety-three days after the initial Section 2255 petition had been denied. Since less than one year had passed between the denial of the petition for writ of certiorari and the filing of the petition, less the time the statute was tolled when the petition was pending, the statute of limitations was not violated. 28 U.S.C. §2255.

Id. Unlike Petitioner Johnson, Walker, very clearly, filed his Section 2255 Motion within the AEDPA 1-year statute of limitations. Petitioner Johnson did nothing for 21 months after

the denial of his application for *certiōrari* to the U. S. Supreme Court. In fact, a period of almost five (5) years passed before he eventually filed his Section 2255 motion on February 13, 2001.

WHEREFORE, having found Petitioner's Motion to Vacate Set Aside or Correct his 1994 sentence to be time-barred by the statute of limitations, the Report and Recommendation of the United States Magistrate Judge is hereby, approved, adopted and made the Order of the Court. Petitioner's Objections to the Report And Recommendation filed June 1, 2001, after thorough consideration, are found to be without merit. No issues having been found requiring determination by evidentiary hearing, Petitioners' request for an evidentiary hearing is also Denied.

SO ORDERED, this 1st day of August 2001.

/s/ WILBUR D. OWENS, JR.
WILBUR D. OWENS, JR.
UNITED STATES DISTRICT JUDGE

(Certificate of Service omitted in printing).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

CASE NO. 7:94-CR-07-WDO
CASE NO: 7:01-CV-14-WDO

[Filed August 7, 2001]

ROBERT JOHNSON, JR.,	)
Petitioner	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
Respondent	)
	)

JUDGMENT

Pursuant to the order of this Court filed August 1, 2001, and for the reasons stated therein, JUDGMENT is hereby entered denying petitioner Johnson's motion for relief under 28 U.S.C. Section 2255.

This 7 day of August, 2001.

GREGORY J. LEONARD, CLERK

BY: /s/ Nora Paul
Nora Paul
Criminal Deputy Clerk

(Certificate of Service omitted in printing).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 01-14830
D.C. Docket No. 01-00014-CV-WDO-7

[Filed August 5, 2003]

ROBERT JOHNSON, JR.,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

Before BLACK, RONEY and STAPLETON*, Circuit Judges.

BLACK, Circuit Judge:

This case allows us to clarify the time limits in cases where career offenders indirectly attack their federal sentences by first collaterally attacking their prior state convictions. Federal prisoner Robert Johnson brought such an indirect attack on his federal sentence, and he now appeals the district court's denial of his § 2255 petition as untimely. We issued a certificate of appealability on the following question:

* Honorable Walter K. Stapleton, United States Circuit Judge for the Third Circuit, sitting by designation.

> Whether the district court correctly determined that appellant's motion to vacate, filed pursuant to 28 U.S.C. § 2255, was untimely under the one-year statute of limitations provision in the Antiterrorism and Effective Death Penalty Act of 1996.

We now conclude Appellant's indirect attack on his federal sentence was untimely, and we therefore affirm.

I. BACKGROUND

Between 1983 and 1994, Appellant pled guilty to several state criminal charges. In 1994, he was indicted as one of five co-defendants on federal drug conspiracy charges, and he pled guilty. A pre-sentence investigation report recommended classifying him as a career offender based on his prior state convictions. Initially, Appellant objected to being classed as a career offender without explaining the basis for his objection. At his sentencing hearing, however, counsel for Appellant advised the district court that Appellant wished to waive all of his objections to the pre-sentence investigation report. Appellant was sentenced as a career offender and received 188 months' imprisonment.

Appellant then filed a direct appeal, contending his prior state convictions were obtained in violation of his constitutional right to counsel, and he therefore should not have been sentenced as a career offender. On December 22, 1995, we affirmed Appellant's sentence. Our unpublished order included the following caveat in a footnote: "We note in passing that, should appellant obtain at some future date the vacation of the state court conviction[s] in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide." *United States v.*

Johnson, No. 94-9402 (11th Cir. Dec. 22, 1995). Appellant sought certiorari from the Supreme Court of the United States, but the Supreme Court denied his petition on April 22, 1996. *Johnson v. United States*, 517 U.S. 1162, 116 S. Ct. 1559 (April 22, 1996) (mem.).

Just over one year later, on April 25, 1997, Appellant filed a motion in the district court to extend the time to file a § 2255 petition. The district court ruled that Appellant's motion was untimely under § 2255 ¶ 6(1). The district court did acknowledge the possibility that exists in every habeas case, namely, that something might transpire that would permit Appellant to take advantage of one of the later accrual dates under § 2255 ¶ 6. It therefore denied Appellant's motion without prejudice.

On February 6, 1998, Appellant filed a state habeas petition challenging all of his prior state convictions on the ground that he had not validly waived his right to counsel in those proceedings. On October 24, 2000, the state court vacated Appellant's prior convictions. Appellant then filed the present § 2255 petition on February 13, 2001, asking the district court to vacate his sentence because he no longer qualified as a career offender. On August 1, 2001, the district court denied the § 2255 petition as untimely. We granted a certificate of appealability, and this appeal followed.[1]

[1] We subsequently appointed counsel to represent Appellant for this appeal.

II. DISCUSSION

As this case involves an indirect challenge to a federal sentence via a collateral attack on prior state convictions, some background on the law of such challenges is helpful.

First, in *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732 (1994), the Supreme Court held that, during his sentencing proceeding, a federal prisoner could not attack the validity of his prior convictions that raised his maximum sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e); the only exception to this rule is for prior convictions based on a deprivation of the right to counsel under *Gideon v. Wainwright*. *See Custis*, 511 U.S. at 496; 114 S. Ct. at 1738.

Second, federal prisoners generally cannot attack prior convictions which enhanced their federal sentences in a § 2255 proceeding challenging the validity of their federal sentence. *Daniels v. United States*, 532 U.S. 374, 376, 121 S. Ct. 1578, 1580 (2001); *see also Lackawanna County District Attorney v. Cross*, 532 U.S. 394, 403-04, 121 S. Ct. 1567, 1574 (2001) (reaching same conclusion for § 2254). If a prior conviction used to enhance a federal sentence is no longer itself open to direct or collateral attack, the defendant is generally without recourse. *Daniels*, 532 U.S. at 382, 121 S. Ct. at 1583.

Following *Custis*, many Circuits including our own have authorized indirect attacks on federal sentences; a defendant may seek to reopen his federal sentencing pursuant to § 2255 if he has successfully attacked a prior state conviction used to enhance his federal sentence. *United States v. Walker*, 198 F.3d 811, 813 (11th Cir. 1999) (per curiam) (citing cases). The effect of these rules has been to redirect challenges to

federal sentences from federal courts to state courts, where court records may have been destroyed and where state executive officials often have no interest in defending a conviction for which the defendant has already served his sentence.

With this background in mind, we turn to Appellant's arguments on appeal.

A. Statute of Limitations

Appellant first argues his § 2255 petition, filed February 13, 2001, was timely under 28 U.S.C. § 2255 ¶ 6(4). That section provides as follows:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> . . . .
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 ¶ 6. Appellant's argument is straightforward: the single "fact" supporting the claim in his § 2255 petition is the vacatur of his prior state convictions; absent those state convictions, Appellant should not have been sentenced as a career offender, and his federal sentence should be vacated. Appellant contends the "fact" supporting his § 2255 claim—the vacatur of his prior state convictions—could not have been discovered until October 24, 2000, the date on which the state court entered its order. He therefore reasons his § 2255 petition, filed on

February 13, 2001, was within one year of October 24, 2000, and thus within the AEDPA statute of limitations.

The question we must answer is whether the vacatur of a state conviction constitutes a "fact" within the meaning of § 2255 ¶ 6(4). Ordinarily, a federal prisoner must file his § 2255 petition within one year of the date on which his judgment of conviction becomes final.[2] Because an indirect collateral attack is predicated on a successful challenge to prior state convictions used to enhance the federal sentence, it is at least plausible to argue that a petitioner has one year from the date his prior state convictions were set aside, under § 2255 ¶ 6(4).

Common sense, however, dictates that we distinguish legal propositions and results from the "facts" referred to in § 2255. A factual proposition is typically something capable in principle of falsification (or possibly even verification) by some empirical inquiry, while a legal proposition is identified by consulting some authoritative legal source. If we are asked whether Appellant's prior state convictions have been vacated, we would consult an authoritative legal source: the records of decisions of the state court where Appellant collaterally attacked those convictions. On the other hand, if we are asked whether Appellant waived his right to counsel before pleading guilty to the state charges, we would need to make an empirical inquiry into the matter, for example by

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[2] AEDPA's statute of limitations applies somewhat differently to a petitioner, like Appellant, whose conviction became final prior to the effective date of AEDPA. Like all other circuits to have considered the issue, we allow such petitioners a one-year grace period until April 23, 1997, to file a § 2255 petition. *See Goodman v. United States*, 151 F.3d 1335, 1337 (11th Cir. 1998).

reading the extant records of Appellant's plea hearings.[3] Put another way, the vacatur of prior state convictions is a court action obtained at the behest of a federal prisoner, not "discovered" by him. *Brackett v. United States*, 270 F.3d 60, 68 (1st Cir. 2001). Applying the common sense distinction between the factual and the legal to § 2255 ¶6(4), we conclude the vacatur of Appellant's prior state convictions is not a "fact" from which the one-year statute of limitations may run.

This common sense reading of the phrase "facts supporting the claim or claims" is bolstered by comparing that accrual date with the other accrual dates in § 2255. Section 2255 ¶ 6(1) refers to the date a judgment becomes final, and § 2255 ¶6(3) refers to the date a right was initially recognized by the Supreme Court. The use of the term "facts" in § 2255 ¶ 6(4) is in contrast to those other subsection's use of "judgments" and "rights," two legal results distinct from historical facts. *See Brackett*, 270 F.3d at 68-69. It follows that the state court's vacatur of Appellant's prior convictions is not a "fact" within the meaning of § 2255 ¶ 6(4).

The interpretation of § 2255 ¶ 6(4) urged by Appellant is also inconsistent with the parallel habeas provision that applies to state prisoners, § 2244(d)(1). Under § 2244(d)(1)(D), the one-year limitation period runs from

[3] Of course, the passage of time may make an empirical inquiry difficult or impossible. *See Lackawanna County*, 532 U.S. at 403, 121 S. Ct. at 1574 ("As time passes, and certainly once a state sentence has been served to completion, the likelihood that trial records will be retained by the local courts and will be accessible for review diminishes substantially."). The possible harm from delay further bolsters our narrower interpretation of AEDPA's statute of limitations.

"the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Were we to adopt Appellant's interpretation of § 2255 and apply it to the parallel provision in § 2244, we would render redundant the word "factual" in § 2244, because all such predicates would be functionally "factual" in nature.

Others of our sister Circuits have interpreted "factual predicate" in § 2244 to mean historical facts, not court rulings or legal consequences. *See Hasan v. Galaza*, 254 F.3d 1150, 1154 & n.3 (9th Cir. 2001); *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000); *Ybanez v. Johnson*, 204 F.3d 645, 646 (5th Cir. 2000) (per curiam) (characterizing as an "extraordinary proposition" the argument that "the factual predicate of their claim consists neither of evidence nor events that happened at trial but in the state court's ruling on their constitutional claims"). As the Supreme Court commonly interprets § 2254 and § 2255 in light of each other, *see Lackawanna County*, 532 U.S. at 402, 121 S. Ct. at 1573, we interpret the limitations period of § 2255 consistently with the limitations period of § 2244. *See Brackett*, 270 F.3d at 69 ("Because § 2254 (habeas corpus from state convictions) and § 2255 (post-conviction relief from federal convictions) are analogous to one another, the way the state habeas provisions are interpreted should be used to interpret § 2255(4).").

Finally, Appellant's interpretation of § 2255 ¶ 6(4) is contrary to the clear legislative purpose of AEDPA. It is generally accepted that one of the principal functions of AEDPA was to ensure a greater degree of finality for convictions. *See Duncan v. Walker*, 533 U.S. 167, 178, 121 S. Ct. 2120, 2127 (2001); *Williams v. Taylor*, 529 U.S. 420, 436, 120 S. Ct. 1479, 1490 (2000); *Jones v. United States*, 304 F.3d 1035, 1039 (11th Cir. 2002) ("A fundamental

purpose for the AEDPA was to establish finality in post-conviction proceedings."); *Brackett*, 270 F.3d at 69 ("[O]ne of the signal purposes animating AEDPA is the desire of Congress to achieve finality in criminal cases, both federal and state."). Given the other substantial grounds for interpreting § 2255 ¶ 6(4) as we do, we cannot accept an alternative interpretation that would also run directly counter to the general congressional intent behind AEDPA and indefinitely extend the opportunity for post-conviction challenges.

Our view thus accords with that of the First Circuit. *See Brackett*, 270 F.3d at 68.[4] In *Brackett*, the petitioner pled guilty to federal criminal charges in July 1997, and he was sentenced as a career offender based on two prior state convictions. *Id.* at 62 His federal sentence became final on March 12, 1998. *Id.* On January 3, 2000, he filed motions in state court to vacate his prior state convictions on the ground that he was denied effective assistance of counsel. *Id.* at 63. The state prosecutor's office agreed to the motions, and his prior state convictions were vacated without any judicial finding of a constitutional violation. *Id.* On December 18, 2000, the petitioner then filed a § 2255 petition to set aside his federal sentence. *Id.* at 62. Like Appellant, he claimed that his § 2255 petition was within one year of the vacatur of his state convictions, so that under § 2255 ¶ 6(4), his petition was timely. *Id.* at 64. The First Circuit disagreed, concluding "the operative date under § 2255(4) is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned,

[4] We have previously cited *Brackett* approvingly. *See Jones*, 304 F.3d at 1039.

the facts supporting his claim to vacate the state conviction." *Id.* at 68.

We recognize that the Fourth Circuit has recently disagreed with *Brackett*, *see United States v. Gadsen*, 332 F.3d 224 (4th Cir. 2003), but we respectfully differ with our sister circuit's interpretation of § 2255 ¶ 6(4).[5] In *Gadsen*, the petitioner pled no contest to a South Carolina assault charge on February 27, 1997. *Id.* at 225. On December 3, 1997, he was convicted in federal court of two federal crimes, and based in part on his February 1997 state conviction, was sentenced as a career offender. *Id.* On January 7, 1998—less than one year after his state conviction, merely a month after his federal conviction, and well before his federal conviction became final following appeal on June 1, 1999—the petitioner filed a petition in South Carolina state court for post-conviction relief from his state conviction. *Id.* On December 20, 1999, the South Carolina court granted his application for post-conviction relief, and the South Carolina Supreme Court declined to review that decision on January 10, 2001. *Id.* at 225-26. With this final order vacating his state conviction in hand, the petitioner filed a § 2255 petition on December 17, 2001, seeking to vacate his federal sentence on the ground that he was no longer a career offender. *Id.* at 226 The district court, however, dismissed his § 2255 petition as untimely. *Id.*

[5] As we explain *infra*, Part II.B, we would reach the same result as the Fourth Circuit in *Gadsen* on the facts as they appeared in that case, but we would do so on the basis of equitable tolling, not statutory construction. On the equitable tolling issue, however, Appellant's case is materially different from *Gadsen*.

On appeal, the Fourth Circuit rejected *Brackett's* interpretation of § 2255 ¶ 6(4), treating the South Carolina court's vacatur of the petitioner's state conviction as a "fact" within the meaning of that section. In particular, the Fourth Circuit relied upon a passage of the Supreme Court's opinion in *Daniels* in which the Court acknowledged that "after an enhanced federal sentence has been imposed . . ., the person sentenced may pursue any channels of direct or collateral review still available to challenge his prior convictions." *Id.* at 228 (quoting *Daniels,* 532 U.S. at 382, 121 S. Ct. at 1583). The Fourth Circuit reasoned that, if it did not interpret § 2255 ¶ 6(4) liberally, "we would be punishing Gadsen and other litigants like him for having faithfully followed these instructions [from *Daniels*]." *Id.*

We think the Fourth Circuit reads the language of *Daniels* for much more than it is worth. To be sure, "[t]he entire point of *Custis* and *Daniels* was that litigants should not bypass state courts to litigate the facts underlying their state convictions during challenges to a federal sentencing determination." *Id.* But as the First Circuit aptly put it in *Brackett*, *Custis* and *Daniels* answer the question of *where* a federal prisoner may bring an attack on a prior state conviction in order to mount an indirect attack on a federal sentence, while the question in this case (as in *Brackett* and *Gadsen*) is *when* that indirect attack may be brought. *See Brackett*, 270 F.3d at 66. The language of *Daniels* on which the Fourth Circuit relies merely outlines the procedure that a federal prisoner must follow to bring an indirect attack on his federal sentence. The "when" question was not present in *Daniels*, so the Supreme Court did not address it and the relevant passage of *Daniels* does not speak to the time limits that apply. The Fourth Circuit reads the Supreme Court's silence on this issue as dictating one interpretation of § 2255 ¶ 6(4) when it does no such thing. *Cf. Barnhart v. Walton,* 535 U.S. 212, ___, 122 S. Ct. 1265,

1270, 152 L. Ed. 2d 330 (2002) ("[S]ilence, after all, normally creates ambiguity. It does not resolve it.").[6]

Thus, we hold with the First Circuit and *contra* the Fourth Circuit that the purported "fact" of a state court's vacatur of a federal prisoner's prior state convictions is not a "fact supporting the claim or claims" under § 2255 ¶ 6(4) from which AEDPA's statute of limitation will run. In this case, Appellant knew all of the facts supporting his challenge to his state convictions before his federal conviction became final. On direct appeal, he attempted to argue his prior state convictions had been obtained in violation of his right to counsel, and it is probable that this was the unstated basis for his initial objection to the pre-sentence investigation report that Appellant withdrew at his sentencing hearing. Appellant was therefore aware of all the relevant operative facts before his conviction became final. Absent some basis for equitable tolling, discussed *infra*, he had to file his § 2255 motion within the one-year grace period following AEDPA's enactment, or by April 23, 1997. Appellant did not file his present § 2255 petition until February 13, 2001, so we conclude his petition was untimely under AEDPA.

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[6] We do not mean to suggest that the "when" question is entirely irrelevant to the "where" question the Supreme Court answered in *Daniels*. *Daniels* would make little sense if, in many ordinary cases, a petitioner seeking to make an indirect attack would find himself permanently shut out of federal court when he brings his § 2255 petition. As we explain *infra*, however, equitable tolling may be available to a petitioner who acts with the requisite diligence in bringing an indirect attack on his federal sentence. *See infra* Part II.B. The availability of that equitable remedy helps to render the procedure outlined in *Daniels* fair and just.

B. Equitable Tolling

Appellant also argues he is entitled to equitable tolling of the AEDPA statute of limitations. We have held that equitable tolling is appropriate when a prisoner's § 2255 petition is untimely because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1286 (11th Cir. 2002); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999). We have emphasized, however, that equitable tolling applies only in truly extraordinary circumstances. *Jones*, 304 F.3d at 1039-40; *Drew*, 297 F.3d at 1286. Appellant bears the burden of establishing that he is entitled to this extraordinary relief. *See Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1313-14 (11th Cir. 2001).

On the facts of this case, Appellant cannot show that the delay in filing his initial § 2255 petition was the result of extraordinary circumstances that were beyond his control even with the exercise of due diligence. Appellant was plainly aware of whatever facts supported his collateral attack on his prior state convictions at the time his federal sentence became final in 1996. He did not commence his challenge to the state convictions until February 1998, nearly two years later. Had Appellant been acting with due diligence, he would have attacked his state convictions immediately after his federal sentence became final, or perhaps even before he was sentenced on the federal offense. Yet Appellant has not even proffered any explanation or excuse that might show why the delay in attacking his underlying state convictions was beyond his control.

By way of comparison, Appellant has even less of a claim for equitable tolling than the petitioner in *Sandvik*. In that case, the petitioner's lawyer mailed his § 2255 petition from

Atlanta to the district court in Miami on April 18, 1997. *Sandvik*, 177 F.3d at 1270. The district court file-stamped the motion on April 25, 1997. *Id.* Because the petitioner's conviction was final prior to the effective date of AEDPA, his § 2255 motion was due no later than April 23, 1997, in accord with the one-year grace period following the enactment of AEDPA. *Id.* Thus, despite counsel's attempt to meet the deadline, the petition was untimely. When petitioner argued for equitable tolling on appeal, we concluded that petitioner's counsel could have mailed the petition earlier or used a private delivery service or a private courier to be certain that it was timely filed. *Id.* at 1272. As it was not a circumstance beyond petitioner's control with the exercise of due diligence, we found no ground for equitable tolling. *Id.* Unlike the petitioner in *Sandvik*, who at least attempted to file a petition within the one-year grace period, Appellant made no similar attempt to act diligently in this case. Rather, he did not even file the state post-conviction challenges on which his § 2255 petition was predicated until nearly two years after his federal conviction became final, despite knowing the basis for those state challenges at the time of his conviction. This is therefore hardly an extraordinary case in which petitioner was unable to meet the deadline through no fault of his own.

Appellant attempts to rescue his argument for equitable tolling by pointing to his April 25, 1997 motion in federal district court seeking to extend the time to file his § 2255 petition. Appellant claims the district court's denial of that motion without prejudice led him believe that he could still file a § 2255 petition at a later date. Yet the district court's order dismissing Appellant's 1997 motion found it to be untimely under § 2255 ¶ 6(1), and it only suggested that he could subsequently file a § 2255 petition if he could establish one of the later accrual dates set forth in § 2255 ¶ 6. As

explained *supra*, however, Appellant cannot come within § 2255 ¶ 6(4) to establish a later accrual date.

Appellant also points to the footnoted caveat in our opinion affirming his sentence on direct appeal, claiming the caveat misled him into thinking § 2255 relief would be available whenever he successfully attacked his state convictions. Nothing in our caveat suggested that Appellant could take an unlimited time to commence his collateral attack on his state convictions.[7] In addition, our opinion affirming his conviction issued prior to the effective date of AEDPA; the caveat may not have contemplated the effect of the new AEDPA limitations period. Following the enactment of AEDPA, Appellant still had the entire one-year grace period within which to take *some* action to attack his conviction and sentence, yet he did nothing.

This is the fundamental problem that plagues Appellant's argument: the long delay before he commenced his state collateral attacks. *Drew* presented a somewhat similar scenario. In that case, the petitioner filed a timely § 2254 petition, which the district court dismissed without prejudice while ordering the petitioner to first file a third state motion for post-conviction relief. *See Drew*, 297 F.3d at 1287. Though the petitioner complied with the district court's order, we concluded that equitable tolling was not warranted in that

[7] In this respect, our caveat is like the passage of *Daniels* that the Fourth Circuit over-emphasizes; our statement, like the Supreme Court's statement in *Daniels*, says nothing about the applicable time limits for an indirect attack. This is not surprising, since our caveat was explicitly noted "in passing." One cannot infer from such a passing statement how the background statute of limitations would apply to Appellant when he finally got around to bringing his indirect attack on his federal sentence.

case in part because the petitioner delayed filing the state motion. *Id.* If the timeliness of that petitioner's initial § 2254 petition did not justify equitable tolling because of his subsequent delay, it is impossible to find any justification for equitable tolling in this case, where Appellant's initial motion was not even timely in the first place.

The facts of *Gadsen* are usefully illustrative on this point. The petitioner in *Gadsen* collaterally attacked his prior state conviction in state court before his federal conviction and sentence were even final. *Gadsen*, 332 F.3d at 225. His state collateral attack was pending in the South Carolina courts for three years, until he ultimately prevailed. *Id.* at 226. If that petitioner were not given the benefit of equitable tolling, then under our interpretation of § 2255 ¶ 6(4), he would be precluded from carrying out his indirect attack for no other reason that the state courts' delay. Such a result would obviously be unfair. Under our circuit precedents, however, we would readily conclude the South Carolina courts' delay in finally disposing of the petitioner's state collateral attack amounted to an extraordinary circumstance beyond the petitioner's control. And because the petitioner launched his challenge in the South Carolina state courts before his federal conviction was final, there can be no doubt as to the petitioner's diligence in pursuing his claims. Thus, while we depart from the Fourth Circuit's opinion on the issue of statutory interpretation, *see supra* part II.A, on the facts of *Gadsen* we would ultimately reach the same result as our sister circuit by allowing that petitioner equitable tolling.

The facts of the present petition, however, are materially different from those in *Gadsen*; the crucial point here is that Appellant did nothing during the one-year AEDPA grace period to attack his prior state convictions collaterally. Unlike the petitioner in *Gadsen*, Appellant did not commence his

state collateral attack until almost two years after his federal sentence became final, and then nearly one year after AEDPA's one-year grace period expired. Given that delay, we are compelled to find there are no extraordinary circumstances in Appellant's case, nor can we conclude that Appellant acted with appropriate diligence. We cannot allow equitable tolling of the AEDPA limitations period on the facts of this case.[8]

III. CONCLUSION

We hold the vacatur of Appellant's prior state convictions is not a "fact supporting the claim or claims" within the meaning of 28 U.S.C. § 2255 ¶ 6(4). Under the statute of limitations that applies to § 2255 petitions, Appellant's petition was therefore untimely. Further, we hold Appellant cannot show, on the facts of this case, that his petition was untimely because of extraordinary circumstances beyond his

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[8] In a final effort to get the benefit of equitable tolling, Appellant claims the denial of equitable tolling would be unconstitutional suspension of the writ of habeas corpus. We have already held that the AEDPA limitations periods do not *per se* constitute a suspension of the writ. *See Tinker v. Moore*, 255 F.3d 1331, 1334 (11th Cir. 2001); *Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213 (11th Cir. 2000). Appellant's argument therefore fails.

In addition, we do not reach Appellant's further argument–raised for the first time on appeal–that the failure to reach the merits of his § 2255 petition would amount to a miscarriage of justice. Arguments not raised in the district court are waived. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam).

control and unavoidable even with the exercise of due diligence. He therefore is not entitled to equitable tolling.

AFFIRMED.

RONEY, Circuit Judge, dissenting:

I respectfully dissent. In my judgment, Johnson's February 13, 2001 § 2255 petition for writ of habeas corpus should not have been dismissed as untimely because the one-year statute of limitation on the claim asserted did not begin to run until October 24, 2000, the date the state court vacated Johnson's July 5, 1989 state conviction for distribution of cocaine - one of the two prerequisite state convictions relied upon by the district court to enhance Johnson's sentence under the career offender category of the Sentencing Guidelines.

Contrary to the Court's opinion, I think a decision of a state court reversing a state criminal conviction is a "fact" within the meaning of 28 U.S.C. § 2255 ¶ 6(4). *See United States v. Gadsen*, 332 F.3d 224, 229 (4th Cir. 2003) (holding that "the federal statute of limitations begins running when the state court conviction is conclusively invalidated"); *United States v. Hoskie*, 144 F. Supp.2d 108, 111 (D. Conn. 2001) (holding that "the one-year statute of limitations starts to run on the date the state convictions are vacated, not an earlier date when the defendant discovered the facts forming the basis for the attack on the state convictions").

With this Court's decision and the decision in *Brackett v. United States*, 270 F.3d 60, 68 (1st Cir. 2001) (holding that "the operative date under § 2255(4) is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction"), there is a clear split in the circuits, which at some point should be resolved by Congress or the Supreme Court. Without question, if the rule announced in this decision and in *Brackett* is consistently applied, in some circuits there will be defendants serving time in federal prison under a federal

sentence based upon conviction of a state crime that the state court has authoritatively held the defendant unquestionably did not commit, who would be barred from relief, while in other circuits relief from such imprisonment will be readily available.

The relevant section, 28 U.S.C. § 2255 ¶ 6(4), provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> . . . .
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

As a "fact" within the meaning of this section, it is obviously new and not previously discoverable because until the state court actually entered the judgment reversing seven outstanding convictions, including Johnson's July 5, 1989 conviction, it had yet to happen and therefore, by definition, could not be a fact at all. *See* Black's Law Dictionary 610 (7th ed. 1999) (defining "fact," "1. Something that actually exists"); Webster's Third New International Dictionary 813 (1993) (defining "fact," "1: a thing done"); The American Heritage Dictionary of the English Language 46 (1975) (defining "fact," "1. something known with certainty"); Black's Law Dictionary 738 (3d ed. 1933) (defining "fact," "1- a thing done"); *see also United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (en banc) ("Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it

said."). Until that date, the fact was that Johnson stood convicted of those numerous crimes. The fact that he does not now stand convicted of those crimes clearly supports his claim because: (1) those seven vacated convictions were relied upon by the sentencing court in one way or another in deriving Johnson's total offense level of 25 and a criminal history category of 6; and (2) only *one* of the two required convictions relied upon by the district court to enhance Johnson's sentence as a career offender was a valid conviction. Without Johnson's vacated July 5, 1989 state conviction for distribution of cocaine, the undeniable fact is that he was not a career offender within the meaning of the Sentencing Guidelines. *See, e.g.*, *United States v. Duty*, 302 F.3d 1240, 1241 (11th Cir. 2002) (noting that a defendant is a "career offender" under the Sentencing Guidelines if, *inter alia*, "the defendant has at least two prior felony convictions for either a crime of violence or a controlled substance offense"); U.S.S.G. § 4B1.1. The sentencing court did not rely upon the underlying conduct that resulted in those convictions, but instead simply relied upon the mere fact that those were valid state court convictions, as recited in the Presentence Investigation Report ("PSI").

Johnson's PSI indicates a total offense level of 25 and a criminal history category of 6, qualifying him for a sentencing range of 110 to 137 months' imprisonment. *See* U.S.S.G. Ch. 5, Pt. A. The district court, however, relied upon the "facts" of *two* prior state convictions to boost Johnson into the career offender category and thus increase his sentence: (1) a July 5, 1989 conviction for distribution of cocaine; and (2) a November 13, 1989 conviction for sale of cocaine. Utilizing the career offender enhancement, the district court enhanced the total offense level from 25 to 32 with a criminal history category of 6, qualifying Johnson for a sentencing range of 151 to 188 months' imprisonment. *See id.* § 4B1.1(b). The

district court sentenced Johnson to 188 months' imprisonment, the highest end of that sentencing range. *See id.* Ch. 5, Pt. A.

As a timely petition, the case should be remanded for the district court to consider Johnson's claims on the merits. If that petition is granted and a resentencing is ordered, Johnson may indeed be faced with some new problems.

Johnson's state petition did not assert that he was innocent of the facts which supported his conviction, but simply alleged that although he pled guilty in each case, the convictions were nonetheless invalid because he did not affirmatively waive his right to counsel. The state made no genuine attempt to defeat his claim, perhaps because Johnson had already served the state prison sentences accompanying those state convictions. This lack of defense to the state petitions is reflected in the state court's opinion, which leaves some doubt as to whether Johnson met the *Strickland* standard for relief from a claim of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The state court's opinion reads as follows:

> Petitioner, after being sentenced to an enhanced sentence because of certain state convictions, filed his Petition for Writ of Habeas Corpus alleging that his pleas in seven cases in Cook County Superior Court were not voluntary in that he did not knowingly, intelligently and voluntarily waive his right to counsel at the hearing on the entry of his guilty pleas. The cases that were challenged by Petition were numbered 83F-9 [Feb. 11, 1989 - burglary], 88F-32 [Mar. 9, 1988 - conversion], 88M-43 [Mar. 9, 1988 - contempt], 89F-122 [July 5, 1989 - distribution of cocaine], 90F-383 [Dec. 5, 1990 - theft and violation

of probation], 92F-36 [Mar. 11,1992 - possession of cocaine] and 93F-148 [April 21, 1993 - possession of cocaine] filed in Cook County Superior Court.

Petitioner . . . filed copies of the plea petitions that accompanied the entry of his pleas. These pleas contained questions about his waiver of the presence and use of an attorney.

The State responded denying the allegations but have not filed any further transcripts of the hearing which would support their position.

This Court findings that the record in these cases does not show an affirmative waiver of his right to an attorney. . . .

> IT IS HEREBY ORDERED that Petitioner's Petition For Writ of Habeas Corpus is hereby GRANTED and the convictions in the above-cited cases are hereby reversed.

Regardless of the ground for the decision, this state court judgment reversed those convictions, and they are no longer valid convictions upon which a sentencing court could rely. That state court judgment is entitled to the same fact analysis as if the convictions had been reversed on the basis of irrefutable evidence that a defendant was in fact innocent of the crimes for which he had been convicted. If the state court's vacatur of the seven state convictions came before the sentencing in this case, it would have been clear error for the court to rely on the fact of conviction. Without those convictions to rely upon, an analysis of Johnson's PSI would show: (1) only three criminal history points derived from Johnson's November 13, 1989 sale of cocaine conviction,

corresponding to an offense level of 25 and a criminal history category of 2; and (2) an insufficient number of prior offenses (one) to support a career offender enhancement.

At the time of sentencing, the PSI properly noted that U.S.S.G. § 4A1.3 provides that a sentencing court may depart upward if "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3. This Court has affirmed several circumstances where a district court applied an upward departure under § 4A1.3. *See, e.g.*, *United States v. Jones*, 289 F.3d 1260 (11th Cir. 2002) (two-level criminal history category upward departure for a defendant's prior juvenile offenses and other offenses too remote to use in calculating a criminal history under the guidelines); *United States v. Hernandez*, 160 F.3d 661 (11th Cir. 1998) (one-level criminal history category upward departure for a defendant's prior non-criminal misconduct related to the sentenced offense); *United States v. Spraggins*, 868 F.2d 1541 (11th Cir. 1989) (three-level criminal history upward departure for defendant with history of molesting children, the need to deter such conduct in the future, and to account for defendant's older previous crimes); *United States v. Dorsey*, 888 F.2d 79 (11th Cir. 1989) (upheld district court's upward departure to a career offender, even though defendant did *not* have two qualifying prior felony convictions under 4B1.1).

Based on the information contained in the PSI, it may well be that a departure upward would be appropriate, but these are matters not before us at this time. The sole issue before us is whether Johnson's § 2255 petition is timely because it was filed within one year of the Georgia state court's vacatur of Johnson's seven prior state convictions. I would hold that it

was timely, would reverse the decision of the district court to the contrary, and would remand to the district court for consideration of the petition on its merits.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 01-14830
District Court Docket No.
01-00014-CV-WDO-7

[Filed August 5, 2003]

ROBERT JOHNSON, JR.,	)
Petitioner-Appellant,	)
	)
versus	)
	)
UNITED STATES OF AMERICA,	)
Respondent-Appellee.	)

Appeal from the United States District Court
for the Middle District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 5, 2003
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 01-14830
D.C. Docket No. 01-00014-CV-WDO-7

[Filed December 22, 2003]

ROBERT JOHNSON, JR.,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION FOR REHEARING EN BANC

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges.

ORDER:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Rehearing En Banc is DENIED.

/s/ J.L. Edmondson
CHIEF JUDGE

BARKETT, Circuit Judge, dissenting from the denial of rehearing en banc:

I believe the issue in this case merits en banc consideration. The panel-majority holds that when a federal court bases an enhanced sentence on a state conviction, the subsequent state vacatur of that very same conviction is not a fact supporting a prisoner's habeas claim that his sentence should be reduced accordingly. I do not believe the panel-majority's statutory interpretation of 28 U.S.C. § 2255 ¶ 6(4) (2003) is supported by law or logic. On the contrary, I believe that Judge Roney's dissent and Judge Wilkinson's opinion for the Fourth Circuit[1] correctly explicate the relevant law.

It is axiomatic that courts must give words their ordinary meaning. United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) ("Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said."). The ordinary meaning of "fact" refers to "a thing done" that can be "known with certainty."[2] In this case, the vacatur of state conviction is a fact because it is something that actually occurred and can be proven in support of Johnson's claim. However, the panel-majority concludes that a vacatur cannot be a fact because it comes from an authoritative legal source.

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[1] United States v. Gadsen, 332 F.3d 224 (4th Cir. 2003).

[2] See Webster's Third New International Dictionary 813 (1993) (defining 'fact,' '1: a thing done'); The American Heritage Dictionary of the English Language 46 (1975) (defining 'fact,' '1. something known with certainty'); Black's Law Dictionary 738 (3d ed.1933) (defining 'fact,' '1-a thing done').

Although distinctions are often made between the facts and the legal consequences of a case,[3] no metaphysical barrier prevents a legal consequence from sometimes operating as a fact. With regard to Johnson's federal habeas claim, the vacatur of his state court conviction is the operative fact that supports his claim, while a reduction in his sentence would be the possible "legal effect or consequence" of that fact.

The panel-majority suggests that the underlying state Gideon violations-and not the state vacaturs-are the facts that support Johnson's habeas claim. Simultaneously, the panel-majority asserts that the underlying constitutional claims would not have been sufficient to support a federal habeas claim, acknowledging that "[t]he entire point of Custis [v. United States, 511 U.S. 485 (1994)] and Daniels [v. United States, 532 U.S. 374, 382 (2001)] was that litigants should not bypass state courts to litigate the facts underlying their state convictions during challenges to a federal sentencing determination." Johnson v. United States, 340 F.3d 1219, 1225 (11th Cir. 2003). Thus, the panel-majority paradoxically asserts that federal courts are not the proper forum for litigating facts underlying a state conviction, but these very same facts can trigger the statute of limitations for federal habeas review.

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[3] See Webster's Third New International Dictionary 813 (1993) (defining "fact" as: "6 usu pl a: any of the circumstances of a case at law as it exists or is alleged to exist in reality: something proved by the evidence to be or alleged to be of actual occurrence b: the reality or events or things the actual occurrence or existence of which is to be determined by evidence."); American Heritage College Dictionary (1982) (defining "fact" as "the aspect of a case at law, comprising events determined by evidence as distinguished from interpretation of law: The jury made a finding of fact.").

The panel-majority also supports its interpretation by arguing that it promotes AEDPA's goal of finality. But that is not AEDPA's only goal. The Supreme Court has continually asserted that AEDPA is designed "to further the principles of comity, finality, and federalism." See, e.g., Woodford v. Garceau, 123 S. Ct. 1398, 1401 (2003); Duncan v. Walker, 533 U.S. 167, 178 (2001); Williams v. Taylor, 529 U.S. 420, 436 (2000). Often decisions will simultaneously promote all three of these principles. In many instances, the Supreme Court has extolled the virtues of finality because of its relation to comity.[4] However, in this case, the federal court poses no risk of disrupting the finality of a state action. The state itself has decided to vacate the conviction. The Supreme Court has stated that in the habeas context a federal court should not "deprive [a] state-court judgment of its normal force and effect." Daniels, 532 U.S. at 378. This is exactly what the

[4] See, e.g., Williams v. Taylor, 529 U.S. 420, 436 (2000) ("AEDPA's purpose to further the principles of comity, finality, and federalism . . . Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings."); Coleman v. Thompson, 501 U.S. 722, 726 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus"); McCleskey v. Zant, 499 U.S. 467, 493 (1991) ("[T]he doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments.").

panel-majority does by stripping the state court of the ability to exculpate criminal defendants.

In summary, I believe that this particular litigant, who followed the instructions of the Supreme Court,[5] who followed the direct instructions of this Court,[6] who followed the proper instructions of the state and was able to have his state convictions timely vacated, and who probably relied on the plain language of § 2255 ¶ 6(4), is unfairly being denied his right to present his habeas petition.

[5] The Supreme Court has explicitly instructed prisoners to attack their convictions in state court. Daniels, 532 U.S. at 382 ("After an enhanced federal sentence has been imposed . . ., the person sentenced may pursue any channels of direct or collateral review still available to challenge his prior conviction."); Custis, 511 U.S. 485 (stating that a prisoner who was still in custody on his prior convictions could "attack his state sentences [in state court] or through federal habeas review").

[6] In this case, the result is even more cruel and unfair, since this Court has previously instructed this Appellant to do precisely what he has done. In a prior opinion affirming Johnson's sentence, we included the following caveat in a footnote: "We note in passing that, should Johnson obtain at some future date the vacation of the state court conviction[s] in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide." United States v. Johnson, No. 94-9402, 73 F.3d 1108 (11th Cir. 1995).

Supreme Court, U.S.
FILED
NOV 12 2004
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No. 03-9685

In the Supreme Court of the United States

ROBERT JOHNSON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When a state court vacates an unconstitutional state conviction used to enhance a federal sentence, is the vacatur of that conviction a "fact supporting the claim" starting the one-year statute of limitations under 28 U.S.C. § 2255(4)?

PARTIES TO THE PROCEEDINGS BELOW

The caption of this case contains the names of all the parties to the proceedings in the courts below. Petitioner Robert Johnson, Jr. was the defendant/appellant in the court of appeals. Respondent United States of America was the plaintiff/appellee in the court of appeals.

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The American Heritage Dictionary of the English Language 46 (1975) 19

Black's Law Dictionary 591 (6th ed. 1990) 19

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In the
Supreme Court of the United States

ROBERT JOHNSON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

Petitioner respectfully requests that this Court reverse the Opinion of the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's denial of Petitioner's motion to vacate pursuant to 28 U.S.C. § 2255.

OPINIONS BELOW

The Opinion of the court of appeals is reported at 340 F.3d 1219 (11th Cir. 2003) and reproduced at J.A. 22. The opinion of the district court is unpublished and is reproduced at J.A. 18.

JURISDICTION

The court of appeals dismissed the petition for rehearing en banc on December 22, 2003. Petitioner timely filed a petition for a writ of certiorari on March 22, 2004. On September 28, 2004, this Court granted certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute relevant to this proceeding is 28 U.S.C. § 2255, which provides in relevant part:

> A 1-year period of limitations shall apply to a motion under this section. The limitation period shall run from the latest of --
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

The full text of the statute is set forth in the attached Appendix. *See* App. 1 - App. 3.

STATEMENT

A. Facts

Robert Johnson, Jr. ("Petitioner" or "Johnson") and five co-defendants were indicted on March 18, 1994, on drug-related charges. J.A. 23. Johnson pled guilty to one count of distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, based on the sale of approximately nine grams of cocaine worth about $1,000. The district court sentenced Johnson as a career offender under U.S.S.G. § 4B1.1 based on the fact of two prior state convictions attributed to Johnson in his Presentence Investigation Report ("PSI").[1] J.A. 23. Johnson received 188 months in prison, the top end of the sentencing range. J.A. 23, 43.

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[1] The Career Offender enhancement under the Sentencing Guidelines in effect at the time of Johnson's sentencing required that: (1) the defendant was at least 18 years old at the time of the instant offense; (2) the offense of conviction was a felony controlled substance offense; and (3) the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1 (November 1, 1994). The PSI used two prior state convictions -- a July 5, 1989 conviction for distribution of cocaine and a November 13, 1989 conviction for sale of cocaine -- to support the career offender enhancement to Johnson's sentence. (PSI ¶¶ 52, 54; Addendum to PSI at 2).

Had Johnson not been sentenced as a career offender, the appropriate range would have been 70-87 months.[2] The district court enhanced Johnson's adjusted offense level from 25 to 32 under U.S.S.G. § 4B1.1 based on the fact of his two prior state court convictions. J.A. 42. Having been classified as a career offender, Johnson was eligible for the enhanced sentencing range of 151 to 188 months, which the district court employed to impose the 188-month sentence. J.A. 42-43. Johnson initially objected to being classified as a career offender in the PSI, but his counsel at the time subsequently withdrew Johnson's objections to the PSI. J.A. 23, 43.

Following sentencing, Johnson filed a direct appeal to vacate his sentence, arguing that the district court based its decision that he was a career offender on prior state convictions in which his guilty pleas were obtained without a valid waiver of his constitutional rights. J.A. 23. The Eleventh Circuit affirmed Johnson's sentence, and declined to consider the merits of Johnson's argument concerning the invalidity of his prior convictions. J.A. 8. The Eleventh Circuit noted, however, that

> should appellant obtain at some future date the vacation of the state court conviction in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide.

---

[2] This assumes that Johnson would have had a criminal history score of 4 in light of the vacatur of all prior convictions in his PSI for which he received criminal history points except his November 13, 1989 conviction.

J.A. 8 n.1. Johnson's petition seeking certiorari from this Court was denied on April 22, 1996. J.A. 24.

On April 25, 1997, the district court received Johnson's *pro se* motion to extend the time to file a § 2255 motion. J.A. 24. The court denied the motion as untimely under § 2255(1).[3] J.A. 24. The district court's Order used language seeming to invite a later filing by Johnson should the state court vacate his state convictions: "[P]etitioner's motion for an extension of time within which to file a § 2255 motion is DENIED WITHOUT PREJUDICE to his right to file a § 2255 motion in the future should he become able to meet one of the other three situations outlined in the statute." (R-174).

Johnson next returned to the state court system, as the Eleventh Circuit had suggested. Johnson filed a pro se petition for a writ of habeas corpus in the Superior Court of Wayne County, Georgia on February 6, 1998. J.A. 24. Johnson argued that his guilty pleas were involuntary because he did not knowingly, intelligently, and voluntarily waive his right to counsel at his guilty plea hearing. J.A. 24. *See Boykin v. Alabama*, 395 U.S. 238 (1969). In support of his petition, Johnson filed copies of the plea petitions accompanying the entry of his state court guilty pleas to support his argument that he had not validly waived his rights in connection with his plea hearing. J.A. 9. The State of Georgia opposed Johnson's habeas petition. J.A. 10.

---

[3] Section 2255(1) provides that the one-year statute of limitation begins to run on the date the defendant's conviction became final.

On October 24, 2000, over the State's objection, the Superior Court of Wayne County vacated, *inter alia*, one of the prior convictions used to classify him as a career offender, holding it was unconstitutional in violation of *Boykin*, *supra*. J.A. 9-10 (citing *Clowers v. State*, 272 Ga. 463, 532 S.E.2d 98 (2000); *Bazemore v. State*, 273 Ga. 160, 535 S.E.2d 760 (2000)).

B. Procedural History

Having succeeded on his state habeas petition, Johnson returned to the federal district court and filed the present § 2255 motion on February 13, 2001, approximately four months after the vacatur of his Georgia convictions. Because Johnson no longer qualified as a career offender, he asked the district court to vacate his enhanced sentence and impose a sentence without the career offender enhancement. J.A. 24. The district court denied the § 2255 motion as untimely because it had not been filed within one year after the completion of direct review. J.A. 18-20. The Eleventh Circuit granted a certificate of appealability and appointed the undersigned as counsel on appeal. J.A. 22, 24 n.1.

On August 5, 2003, the Eleventh Circuit affirmed the denial of Johnson's § 2255 petition as untimely in a divided panel decision. The panel majority held that Johnson's motion had not been filed within one year from the date on which "facts supporting the claim or claims presented could have been discovered" under § 2255(4). J.A. 26-28, 33. Accordingly, the panel reasoned, the motion was filed outside the one-year limitations period otherwise applicable in § 2255(1). J.A. 26-28, 33.

The panel majority rejected Johnson's argument that the "fact" supporting his claim for relief under § 2255 was the

fact that his prior state court convictions had been vacated, which eliminated his status as a career offender. J.A. 26-28. Instead, the panel held that the vacatur of Johnson's state court conviction is not a "fact" within the meaning of § 2255(4), but rather a "legal proposition." J.A. 27. In so holding, the panel essentially followed the First Circuit's decision in *Brackett v. United States*, 270 F.3d 60, 68-69 (1st Cir. 2001).

The panel's dissent, following the Fourth Circuit's recent decision in *United States v. Gadsen*, 332 F.3d 224, 229 (4th Cir. 2003), concluded that Johnson's petition was timely. J.A. 40-43 (Roney, J., dissenting). The dissent reasoned that the state court vacatur is a "fact" within the meaning of § 2255(4). J.A. 40. Therefore, "the one-year statute of limitation on the claim asserted did not begin to run until October 24, 2000," the date on which the state court vacated Johnson's predicate conviction. J.A. 40. Like the Fourth Circuit in *Gadsen*, the dissent reasoned that the term "fact," as used in § 2255(4), should have its ordinary meaning: "a thing done" or "something known with certainty." J.A. 40-41. Consistent with *Gadsen*, the dissent concluded that the fact of the state court vacatur was "obviously new and not previously discoverable" until the state court "actually entered the judgment" overturning Johnson's prior state conviction. J.A. 41. And the fact of the vacatur "supported the claim or claims presented" by Johnson within the meaning of § 2255(4) because without the subsequently vacated state convictions, "the undeniable fact" is that Johnson "was not a career offender within the meaning of the Sentencing Guidelines." J.A. 42.

The Eleventh Circuit subsequently denied Johnson's petition for rehearing en banc. J.A. 49. Judge Barkett dissented from the denial and expressed her view that "Judge

Roney's dissent and Judge Wilkinson's opinion for the Fourth Circuit [in *Gadsen*] correctly explicate the relevant law." J.A. 50. Judge Barkett disagreed with the panel's distinction between "legal" facts and "empirical" facts, noting that there is "no metaphysical barrier [that] prevents a legal consequence from sometimes operating as a fact." J.A. 51. As Judge Barkett explained, "the vacatur of [Johnson's] state court conviction is the operative fact that supports his claim, while a reduction in his sentence would be the possible 'legal effect or consequence' of that fact." J.A. 51. Judge Barkett concluded by stating,

> [T]his particular litigant, who followed the instructions of the Supreme Court, who followed the direct instructions of this Court, who followed the proper instructions of the state and was able to have his state convictions timely vacated, and who probably relied on the plain language of § 2255 ¶ 6(4), is unfairly being denied his right to present his habeas petition.

J.A. 53 (footnotes omitted).

The Eleventh Circuit's decision below is part of a split of authority among the courts that have considered the issue of whether the vacatur of a prior state conviction is a "fact" triggering the statute of limitations in § 2255(4).[4] Johnson

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[4] *Compare Johnson v. United States*, 340 F.3d 1219 (11th Cir. 2003), *United States v. Brackett*, 270 F.3d 60 (1st Cir. 2001), *United States v. Pollard*, 290 F. Supp. 2d 153 (D.D.C. 2003), *and Candelaria v. United States*, 247 F. Supp. 2d 125 (D.R.I. 2003) *with United States v. Mobley*, 96 Fed. Appx. 127 (4th Cir. 2004) (per curiam), *United States v. Gadsen*, 332 F.3d 224 (4th Cir. 2003), *United States v. Hicks*, 286 F. Supp. 2d 768 (E.D. La. 2003), *United States v. Venson*, 295 F. Supp. 2d 630 (E.D. Va. 2003), *and United States v. Hoskie*, 144 F. Supp. 2d 108 (D. Conn. 2001).

petitioned this Court for a writ of certiorari, which the Court granted on September 28, 2004.

SUMMARY OF ARGUMENT

In *Custis v. United States*, 511 U.S. 485 (1994), and *Daniels v. United States*, 532 U.S. 374 (2001), this Court held that prior convictions used to enhance a federal sentence generally could not be challenged either at sentencing or on § 2255 review. The point of *Daniels* is that the facts showing a prior conviction is unconstitutional do not (with rare exception) support a claim under § 2255. The Court in *Custis* and *Daniels* suggested that the proper procedure is for the defendant first to attack his state conviction in state court (or through appropriate § 2254 proceedings) and, if successful, use the vacatur of that prior conviction to reopen his federal sentence.

Johnson did just that. He went back to state court and, *pro se*, obtained the vacatur of a prior conviction used to classify him as a "career offender" under the Sentencing Guidelines and to enhance his federal sentence. The question presented in this case is whether that vacatur is a "fact supporting the claim" under § 2255(4), thus triggering the statute of limitations.

The plain meaning of "fact" is "a thing done." The thing done in this case was the vacatur, which could not have been discovered until it was granted by the state court. The Eleventh Circuit's distinction between "facts" and "legal propositions" adds limitations that change the ordinary

meaning of the statutory language. The terms "legal proposition" and "fact" are not mutually exclusive. Legal propositions become historical facts when used as predicates in a later proceeding. Under the Eleventh Circuit's rationale, convictions also would be considered "legal propositions," yet prior convictions are treated as historical "facts" in many contexts, including their introduction at trial and sentencing for a variety of purposes. Indeed, this Court repeatedly has referred to the "fact of a prior conviction" in a variety of contexts. If a prior conviction is a "fact," it follows that the vacatur of that conviction also is a "fact."

Importantly, § 2255(4) starts the statute of limitations upon discovery of a "fact supporting the claim." This Court made clear in *Daniels* that the facts underlying allegations that a prior conviction was unconstitutional cannot support a § 2255 claim. The Eleventh Circuit's ruling below creates a logical contradiction: under *Daniels*, the facts underlying the prior conviction cannot support a § 2255 claim, but under the Eleventh Circuit's rule, these same facts support a § 2255 claim for purposes of calculating the statute of limitations. The more consistent and natural reading of § 2255(4) -- and indeed, the only interpretation consistent with *Custis* and *Daniels* -- is that the vacatur of a prior conviction is the fact supporting Johnson's § 2255 claim.

Not only does the Eleventh Circuit's rule conflict with the underpinnings of *Custis* and *Daniels*, it also virtually eliminates the rights established in those cases. As a practical matter, it is nearly impossible for a defendant who files a state habeas proceeding upon being sentenced by the federal court (as suggested in *Daniels*) to complete state habeas review before his federal conviction becomes "final" under § 2255(1). Indeed, had Johnson filed his state habeas proceedings the day he was sentenced by the district court, he

still would not have received the vacatur from the state court before his federal conviction became final. Moreover, the State has an incentive to take appeals (as it did in at least one published case) that prolong the state proceedings and cause the defendant to miss the federal statute of limitations (unless "placeholder" petitions are allowed). Such a construction of § 2255(4) is particularly troublesome because it presumes that Congress, in enacting the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) two years after *Custis*, intended to essentially eliminate the procedure established by this Court merely by using the word "fact" in § 2255(4).

The two considerations motivating *Custis* and *Daniels* -- ease of administration and finality -- are served by adopting Johnson's interpretation of "fact." If the Eleventh Circuit's rule is adopted, the federal courts will be flooded with "placeholder" habeas petitions that are filed within one year of convictions becoming final and then stayed until state habeas has been completed. The vast majority of these federal petitions will be meritless, but district courts will be forced to manage them until petitioners complete state habeas. By contrast, under Johnson's interpretation of § 2255(4), waiting for the rare vacatur of a prior state conviction will mean that more meritorious federal petitions are filed only after they become ripe. Finality will not be served through placeholder petitions -- they will only delay the vast majority of cases, in which the prior convictions will not be vacated.

Finally, AEDPA is designed to further not only finality, but also federalism and comity -- along with balancing the ends of fundamental fairness. Honoring state court rulings furthers federalism through sensitivity to the legitimate interests of the States in managing their post-conviction processes and by giving state-court judgments their full force and effect. Treating the vacatur of a state conviction as a

"fact" triggering the § 2255(4) statute of limitations will help ensure that the Government is not keeping an inmate, such as Johnson, in prison based on a prior conviction the State has conclusively determined was obtained in violation of the Constitution.

ARGUMENT

This case involves interpretation of the statute of limitations in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA added a one-year statute of limitations on federal "habeas" claims challenging a federal sentence under 28 U.S.C. § 2255. This statute of limitations begins to run on one of four enumerated dates. At issue in this case is the fourth trigger of the one-year limitation period:

> A 1-year period of limitations shall apply to a motion under this section. This limitations period shall run from the latest of --
>
> * * *
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(4).

In *Custis v. United States*, 511 U.S. 485, 487 (1994), and *Daniels v. United States*, 532 U.S. 374, 376 (2001), the Court addressed whether prior state convictions used to enhance a federal sentence could be challenged either at sentencing or on § 2255 review. The Court concluded that, as a general matter, prior state convictions may not be attacked at

sentencing or on § 2255 review and indicated that the proper procedure was for a defendant first to attack his conviction in state court (or through an appropriate § 2254 proceeding) and, if successful, then seek to reopen his federal sentence. *Custis*, 511 U.S. at 497; *Daniels*, 532 U.S. at 382. The Court has not addressed how the one-year limitations period in § 2255 squares with the direction in *Custis* and *Daniels* that defendants must first seek to overturn their prior state convictions in state court before seeking to reopen their federal sentence under § 2255.

I. *CUSTIS* AND *DANIELS* REQUIRE DEFENDANTS TO CHALLENGE THEIR PRIOR STATE CONVICTIONS IN STATE PROCEEDINGS OR THROUGH § 2254

A. *Custis* Precludes Most Collateral Attacks Of A Prior Conviction At The Time Of Federal Sentencing

In *Custis*, this Court held that a defendant in a federal sentencing proceeding may not, with one narrow exception, collaterally attack the validity of a previous state conviction that is used to enhance his sentence under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) (the "ACCA"). 511 U.S. at 497. The sole exception is that convictions obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), may be challenged at sentencing.

The Court based its conclusion on its determination that the language of the ACCA and the Constitution do not require that a defendant be permitted to collaterally attack prior convictions in the course of a federal sentencing proceeding, with the exception of *Gideon* challenges. *Custis*, 511 U.S. at 490-97; *see also Daniels*, 532 U.S. at 378 ("We held that

with the sole exception of convictions obtained in violation of the right to counsel, Custis had no right under the ACCA or the Constitution 'to collaterally attack prior convictions' in the course of his federal sentencing proceeding.") (citation omitted).

The *Custis* Court supported its conclusion with two considerations: ease of administration and the interest in promoting finality of judgments. *Custis*, 511 U.S. at 496-97. First, as to ease of administration, the Court concluded that resolution of constitutional challenges (other than *Gideon* challenges) "would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 states." *Id.* at 496. Second, the Court determined that the interest in promoting finality of state-court judgments militates against permitting a collateral attack of that judgment at federal sentencing. *Id.* at 497. "By challenging the previous conviction, the defendant is asking a district court to deprive the state-court judgment of its normal force and effect in a proceeding that has an independent purpose other than to overturn the prior judgment." *Id.* (quotation and citation omitted).

The upshot of *Custis* is that collateral attacks of prior convictions used as predicate felonies under the ACCA are not cognizable at federal sentencing, with the narrow exception of collateral attacks based on *Gideon* challenges. The *Custis* rule has been extended to bar collateral attacks at sentencing of prior convictions used to enhance a federal sentence under the Sentencing Guidelines and under statutes

other than the ACCA, unless specifically permitted.[5] *See, e.g.*, *Brackett v. United States*, 270 F.3d 60, 65 (1st Cir. 2001); *United States v. Bacon*, 94 F.3d 158, 163 (4th Cir. 1996); *United States v. Arango-Montoya*, 61 F.3d 1331, 1336 (7th Cir. 1995); *United States v. Bonds*, 48 F.3d 184, 186-87 (6th Cir. 1995); *United States v. Thomas*, 42 F.3d 823, 824 (3d Cir. 1994); *United States v. Garcia*, 42 F.3d 573, 581 (10th Cir. 1994); *United States v. Burrows*, 36 F.3d 875, 885 (9th Cir. 1994); *United States v. Jones*, 28 F.3d 69, 70 (8th Cir. 1994) (per curiam); *United States v. Jones*, 27 F.3d 50, 52 (2d Cir. 1994) (per curiam).

Custis expressly recognized, however, that a defendant could attack his state conviction in state proceedings or federal habeas review (§ 2254) and, if successful, seek to reopen his federal sentence. *Custis*, 511 U.S. at 497. "If Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences. We express no opinion on the appropriate disposition of such an application." *Id.*

B. *Daniels* Generally Precludes Collateral Attack Of A Prior Conviction Under § 2255

In *Daniels,* the Court extended the *Custis* rule to § 2255. It held that a prisoner whose sentence was enhanced under the ACCA by prior state convictions generally may not challenge

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[5] For example, 21 U.S.C. § 851(c) specifically permits such a collateral attack because it "sets forth specific procedures allowing a defendant to challenge the validity of a prior conviction used to enhance the sentence for a federal drug offense." *Custis*, 511 U.S. at 491.

the prior convictions through § 2255.[6] 532 U.S. at 376. The Court grounded its decision in the underlying policy considerations that supported *Custis*. The Court determined that, as in *Custis*, "ease of administration" would be hindered by allowing review under § 2255 because state court materials (e.g., records and transcripts) supporting the state conviction would be difficult to obtain. *Id.* (noting that "institutional competence [of district courts in making factual determinations] does not make decades-old state court records and transcripts any easier to locate"). With regard to finality, the Court concluded that "a State retains a strong interest in preserving the convictions it has obtained." *Id.*; *see also id.* at 380 ("Thus, the State does have a real and continuing interest in the integrity of its judgments.").

As in *Custis*, the Court in *Daniels* noted that a defendant who successfully challenges his underlying state convictions could then apply to reopen his federal sentence:

> After an enhanced federal sentence has been imposed pursuant to the ACCA, the person sentenced may pursue any channels of direct or collateral review still available to challenge his prior conviction. In *Custis*, we noted the possibility that the petitioner there, who was still in custody on his prior convictions, could 'attack his state sentences [in state court] or through federal habeas review.' If any such challenge to the underlying conviction is successful, the defendant may then apply for reopening of his federal sentence. As

[6] A plurality of the Court determined that there may be rare circumstances in which § 2255 would be available. *Daniels*, 532 U.S. at 376.

> in *Custis*, we express no opinion on the appropriate disposition of such an application.

532 U.S. at 382 (citation omitted).

The upshot of *Daniels* is that challenges to prior state convictions generally are not cognizable under § 2255. *Custis* and *Daniels* stand for the proposition that facts demonstrating that prior state convictions are unconstitutional do not support a collateral attack at federal sentencing or in a § 2255 proceeding. Instead, these cases indicate that a defendant should collaterally attack the state conviction in state court and, if successful, then seek to reopen his federal sentence.

All circuits to have addressed the issue have indicated that, under *Custis* and *Daniels*, the proper way to reopen a sentence after the vacatur of a prior conviction is through 28 U.S.C. § 2255. *See United States v. Clipper*, 313 F.3d 605, 608 (D.C. Cir. 2002); *United States v. Doe*, 239 F.3d 473, 475 (2d Cir. 2001) (per curiam); *United States v. Escobales*, 218 F.3d 259, 261 (3d Cir. 2000); *United States v. Walker*, 198 F.3d 811, 813-814 (11th Cir. 1999) (per curiam); *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999); *United States v. LaValle*, 175 F.3d 1106, 1108 (9th Cir. 1999); *United States v. Pettiford*, 101 F.3d 199, 200-02 (1st Cir. 1996); *United States v. Bacon*, 94 F.3d 158, 161 n.3 (4th Cir. 1996); *United States v. Cox*, 83 F.3d 336, 339-40 (10th Cir. 1996); *United States v. Rogers*, 45 F.3d 1141, 1143 (7th Cir. 1995); *United States v. Nichols*, 30 F.3d 35, 36 (5th Cir. 1994) (per curiam).

II. THE PLAIN LANGUAGE OF § 2255(4) SUPPORTS THE CONCLUSION THAT A VACATUR IS A "FACT"

The starting point in a statutory construction case is the plain language of the statute. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002); *see also Artuz v. Bennett*, 531 U.S. 4, 8 (2000). "The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart*, 534 U.S. at 450 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, the first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quotation omitted).

It is well settled that courts must give words in a statute their ordinary meaning. *See Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").

At issue in this case is the following language of § 2255 triggering the statute of limitations: "the date on which **facts supporting the claim** or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(4) (emphasis added). The key question is whether the vacatur of Johnson's state conviction constitutes a "fact" supporting Johnson's claim within the meaning of § 2255(4).

A. The Ordinary Meaning Of "Fact" Is "A Thing Done"

This Court has looked to dictionary definitions to determine the ordinary meaning of a word in AEDPA. *See, e.g., Carey v. Saffold*, 536 U.S. 214, 219-20 (2002) (looking to dictionary to determine ordinary meaning of "pending" in § 2244(d)(2)).

The ordinary meaning of the word "fact" is "a thing done" -- i.e., something that has actually happened. Webster's Third New International Dictionary 813 (1993) (defining "fact," "1: a thing done"); The American Heritage Dictionary of the English Language 46 (1975) (defining "fact," "1. something known with certainty"); *see also* J.A. 50-51. The definition of "fact" in Black's Law Dictionary reflects the ordinary meaning of this word in the English language:

> A thing done; an action performed or an incident transpiring; an event or circumstance; an actual occurrence; an actual happening in time or space or an event mental or physical; that which has taken place. A fact is either a state of things, that is, an existence, or a motion, that is, an event. The quality of being actual; actual existence or occurrence.

Black's Law Dictionary 591 (6th ed. 1990) (citation omitted).

The vacatur of Johnson's predicate state conviction is "a thing done." It is an incident that transpired in the historical sense and can be known with certainty. Defendants, like Johnson, must wait until their prior convictions have been vacated before they can assert a § 2255 claim. Until that thing -- the vacatur -- is done, the defendant does not have a

basis for a § 2255 claim to reduce his sentence. *See Daniels*, 532 U.S. at 376, 382 (requiring the vacatur of the prior conviction before seeking to reopen a federal sentence).

Johnson's federal sentence was enhanced based on the presence of two prior Georgia convictions. In determining Johnson's status as a "career offender" under U.S.S.G. § 4B1.1, the district court needed to make a factual determination that, *inter alia*, he had at least two prior felony convictions of either a "crime of violence" or a "controlled substance offense." This can involve questions of whether the Government has established the fact of a requisite prior conviction by a preponderance of the evidence for purposes of § 4B1.1. *See, e.g.*, *United States v. Hernandez*, 218 F.3d 272, 278 (3d Cir. 2000); *United States v. McDonald*, 964 F.2d 390 (5th Cir. 1990) (addressing evidentiary questions and sufficiency of Government's evidence establishing career offender status under U.S.S.G. § 4B1.1). As the Fourth Circuit noted on similar facts: "A critical 'fact' with respect to the operation of the sentencing guidelines in Gadsen's [the defendant's] original federal case was the fact that Gadsen's record included a prior state conviction for assault with intent to kill." *United States v. Gadsen*, 332 F.3d 224, 227 (4th Cir. 2003).

Just as Johnson's conviction was a fact used to enhance his sentence, the vacatur of his conviction is a fact supporting his request to eliminate the enhancement. *See id.* ("In just the same way, the relevant 'fact' with respect to the operation of Gadsen's claim today is the fact that Gadsen's prior state conviction has been conclusively invalidated."). This "fact" could not have been raised in his federal case until Georgia vacated his prior state convictions. *See Custis*, 511 U.S. at 497; *Daniels*, 532 U.S. at 382; *see also Gadsen*, 332 F.3d at 227 ("[T]his fact was not conclusive for our purposes until the

South Carolina Supreme Court denied the government's petition for certiorari.").

Finally, when interpreting a word in a statute, it is important to examine how the word is used in context. *Leocal v. Ashcroft*, ___ U.S. ___, ___, 4 U.S.L.W. 216 (Nov. 9, 2004) ("Particularly when interpreting a statute that features as elastic a word as 'use,' we construe language in its context and in light of the terms surrounding it.") (citations omitted). Here, the word "fact" is used as part of the phrase: "facts supporting the claim." § 2255(4). The facts underlying Johnson's contention that his prior state convictions were unconstitutional were not facts supporting a § 2255 claim to eliminate the career offender enhancement. *See Daniels*, 532 U.S. at 384 (holding that facts showing priors were unconstitutional do not support § 2255 claim (with rare exception)). The fact supporting Johnson's claim under § 2255 to reduce his sentence is the vacatur of his state conviction.

B. Ordinary Use Of The Word "Facts" In Other Contexts Supports Johnson's Interpretation

Johnson's interpretation of the word "facts" comports with the common or ordinary usage of this term in other contexts. This Court routinely refers to prior convictions as "facts." *See, e.g.*, *Blakely v. Washington*, 124 S. Ct. 2531, 2536 (2004) ("the fact of a prior conviction") (internal quotation marks omitted); *Dretke v. Haley*, 124 S. Ct. 1847, 1853 (2004) ("the recidivist statute at issue required the jury to find not only the existence of his prior convictions but also the additional fact that they were sequential"); *Nelson v. Campbell*, 124 S. Ct. 2117, 2122 (2004) ("fact of his conviction"); *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) ("the fact of a previous conviction");

McKune v. Lile, 536 U.S. 24, 59 (2002) ("the fact of a valid conviction"); *Republican Party of Minn. v. White*, 536 U.S. 765, 809 (2002) (Ginsburg, J., dissenting) (referring to convictions as an example of a "historical fact"); *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000) ("Both the certainty that procedural safeguards attached to any **'fact' of prior conviction**, and the reality that Alendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range.") (emphasis added); *Id.* at 501 (Scalia, J., concurring) ("including the fact of a prior conviction"); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) ("any fact (other than prior conviction) that increases the maximum penalty for a crime"); *Taylor v. United States*, 495 U.S. 575, 602 (1990) (noting that for purposes of enhancement in a certain context, sentencing court should look only to "fact of conviction").

Indeed, even in *Custis*, the Court referred to prior convictions as "facts" when discussing how the ACCA treats previous convictions: "The statute focuses on the *fact* of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted." *Custis*, 511 U.S. at 490-91 (emphasis in original).

The point of these examples is to illustrate that the ordinary usage of the term "facts" includes prior convictions. And if a prior conviction is a "fact" for purposes of enhancement, then it follows that the vacating of that prior conviction also is a "fact" for purposes of eliminating that enhancement. *Gadsen*, 332 F.3d at 227.

C. The Eleventh Circuit's Interpretation Of "Fact" Limits The Ordinary Meaning

The Eleventh Circuit concluded that the vacatur of Johnson's state conviction was not a "fact" within the meaning of § 2255(4) -- instead, it concluded that the vacatur is merely a "legal proposition." J.A. 27. The Court reasoned: "A factual proposition is typically something capable in principle of falsification (or possibly even verification) by some empirical inquiry, while a legal proposition is identified by consulting some authoritative legal source." J.A. 27; *see also Brackett v. United States*, 270 F.3d 60, 68-69 (1st Cir. 2001).

But this distinction makes little sense. A conviction and a vacatur of that conviction are both legal propositions and facts that may be relevant to later legal proceedings. At sentencing, Johnson's prior state convictions -- while themselves "legal propositions" -- were used as "facts" for purposes of classifying Johnson as a career offender. "[N]o metaphysical barrier prevents a legal consequence from sometimes operating as a fact. With regard to Johnson's federal habeas claim, the vacatur of his state court conviction is the operative fact that supports his claim, while a reduction in his sentence would be the possible 'legal effect or consequence' of that fact." J.A. 51 (Barkett, J., dissenting).

Indeed, it is not unusual to treat past "legal propositions" as "facts" in a different proceeding. For example, prior convictions are routinely submitted for evidentiary purposes at civil and criminal trials. *See, e.g.*, *Burgett v. Texas*, 289 U.S. 109 (1967) (discussing use of prior convictions as evidence in state criminal trial). Such a prior conviction, although a legal proposition in its own right, still must be proven as a fact in a separate legal proceeding. In fact, Rule

609 of the Federal Rules of Evidence is designed specifically to address the use of a prior conviction as evidence.

The First and Eleventh Circuits also reason that the vacatur of a state conviction is not a "fact" within the meaning of § 2255(4) because it was not "discovered" by Johnson. J.A. 28 ("[T]he vacatur of prior state convictions is a court action obtained at the behest of a federal prisoner, not 'discovered' by him") (citation omitted); *Brackett*, 270 F.3d at 68; *see also* 28 U.S.C. § 2255(4) ("the date on which the facts supporting the claim or claims presented could have been **discovered** through the exercise of due diligence.") (emphasis added).

This argument -- like the Eleventh Circuit's interpretation of "facts" -- limits the ordinary meaning of the statutory terms. The word "discovery" simply means "the act, process, or an instance of gaining knowledge of or ascertaining the existence of something previously unknown or unrecognized." Webster's Third New International Dictionary 813 (1993). In this case, the vacatur of the Georgia conviction could not have been discovered before it was issued. When the vacatur became a fact, it became known -- i.e., was "discovered" -- by Johnson, and the one-year limitation period in § 2255(4) began. It is conceivable that a defendant might not "discover" a vacatur (or other court ruling) when it issues -- e.g., if the prisoner is incarcerated and is not provided notice of the ruling.

In short, the interpretation of the term "fact" pressed by the First and Eleventh Circuits distorts its ordinary meaning. There is no limit in the plain language of § 2255(4) to "empirical facts," as encouraged by the Eleventh Circuit, or anything to suggest that the vacatur could somehow be discovered by Johnson before it occurred.

D. The Eleventh Circuit's Reliance On "Factual Predicate" In 28 U.S.C. § 2244 Is Misplaced

The Eleventh Circuit placed heavy reliance on a comparison of § 2255(4) with 28 U.S.C. § 2244 to bolster its conclusion that Johnson's vacatur was not a "fact." J.A. 28-29. This reliance misses the point by failing to compare "apples to apples." As discussed in greater detail below, in § 2244 cases, the question before the federal court is whether the state conviction is unconstitutional. The operative facts are the underlying historical facts supporting petitioners' constitutional challenges in state court. By contrast, here, the question before the federal court is not whether the state conviction is unconstitutional, but rather, whether the sentence should be recalculated in light of the state court's ruling. The operative fact underlying Johnson's claim is the historical fact of the vacatur, not the underlying facts demonstrating the unconstitutionality of his state conviction. As shown below, the Eleventh Circuit's analysis is misplaced because the § 2244 cases support Johnson's position, not the Government's.

Section 2244, the statute applicable to state prisoners seeking relief under 28 U.S.C. § 2254, provides a one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). That limitation period runs from the latest of four events, three of which "closely track corresponding portions of § 2255." *Clay v. United States*, 537 U.S. 522, 528 (2003) (citation omitted). Similar to § 2255(4), § 2244 starts the clock on, *inter alia*:

> the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(D).

The Eleventh Circuit looked to decisions in other circuits that "interpreted 'factual predicate' in § 2244 to mean historical facts, not court rulings or legal consequences." J.A. 29 (citing cases). The Eleventh Circuit concluded that because §§ 2254 and 2255 commonly are interpreted in light of each other, the word "facts" in § 2255(4) should be read to mean historical facts. J.A. 29; *see also Brackett*, 270 F.3d at 69 (noting that "factual predicate" in § 2244(d)(1)(D) has been interpreted to mean "evidentiary facts or events and not court rulings or legal consequences of the facts," and concluding that "facts" in § 2255 should be interpreted the same way).

The Eleventh Circuit is correct that §§ 2254 and 2255 often are interpreted in light of one another, but the cases on which it relies do not undercut Johnson's argument that the vacatur of his state convictions is a fact supporting his claim under § 2255(4) -- indeed, these cases strongly support Johnson's position. The § 2244 cases distinguishing "historical facts" from "legal propositions" deal with different questions. *See, e.g.*, *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001); *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000); *Ybanez v. Johnson*, 204 F.3d 645, 646 (5th Cir. 2000) (per curiam). In those cases, the court typically is faced with a state prisoner's claim under § 2254 that his state conviction was unconstitutional. Normally, the statute of limitations in that context begins upon completion of direct review of the state conviction, and is tolled by pending state post-conviction review. 28 U.S.C. §§ 2244(d)(1)-(2). The

statute of limitations begins anew upon the discovery of a factual predicate that previously could not have been discovered through the exercise of due diligence. § 2244(d)(1)(D). Claims under § 2254 must be presented first in the state post-conviction process to comply with the exhaustion rules. § 2254(b)(1)(A). What these petitioners are asking the federal habeas court to review is the state habeas court's determination of a legal question arising out of underlying facts. Thus, it is discovery of the underlying facts that triggers the statute of limitations, not the state habeas court's rulings based on those facts.

For example, in *Ybanez v. Johnson*, a § 2244 case relied upon by the Eleventh Circuit below, two petitioners sought to have the statute of limitations begin running when the state habeas decision became final. 204 F.3d at 646. One of the petitioners contended that the state court's refusal to consider his second state habeas application was the "factual predicate" for his federal claim, and the other asserted that the state court's application of the facts to his ineffective assistance claim was the "factual predicate." *Id.* The Fifth Circuit rejected both arguments: "Behind the petitioners' language is an extraordinary proposition: the factual predicate for their claims consists neither of evidence nor events at trial but in the state court's rulings on their constitutional claims." *Id.* Instead, the Fifth Circuit ruled that the "factual predicates" for the petitioners' claims were the facts underlying their respective unconstitutional jury instruction and ineffective assistance of counsel claims, not the state court's ruling on their claims. *Id.*

Ybanez and similar cases do not alter the conclusion that the term "fact" in § 2255 refers to the vacatur of Johnson's state convictions. In *Ybanez*, the historical facts of how the lawyer represented the petitioners and whether they were

prejudiced by that representation comprise the factual predicate for the ineffective assistance claim. The federal habeas court in *Ybanez* was asked to review the state court's conclusion that the petitioners' trial lawyer rendered ineffective assistance of counsel, and therefore was asked to reach a legal conclusion based on the same underlying facts as the state habeas court. These underlying facts were the facts supporting the petitioners' § 2254 claims.

By contrast, the facts underlying Johnson's vacatur of his state conviction are not the facts supporting his § 2255 claim. *See Daniels*, 532 U.S. at 377. It is the vacatur of his state conviction that forms the basis of his § 2255 claim. In other words, the vacatur is the "factual predicate" analogous to the facts demonstrating ineffective assistance of counsel in *Ybanez*. The federal habeas court here, unlike *Ybanez*, is not being asked to review the correctness of the state habeas court's conclusion that Johnson's prior conviction was obtained in violation of the Constitution. That fact has been conclusively established.

III. THE ELEVENTH CIRCUIT'S RULE CONFLICTS WITH *CUSTIS* AND *DANIELS*

A. The Eleventh Circuit's Rule Squarely Contradicts *Daniels*

In *Daniels*, this Court held that a prisoner whose sentence was enhanced under the ACCA by prior state convictions generally may not challenge the prior convictions through a motion under 28 U.S.C. § 2255. 532 U.S. at 376. The Court concluded that a challenge to the petitioner's prior state convictions was not cognizable under § 2255. *Id.* In other words, the Court ruled that the facts underlying the claim that

the petitioner's prior state convictions were unconstitutional were not facts that could support a § 2255 claim.

Under the Eleventh Circuit's rule, however, the facts underlying the claim that the Petitioner's prior conviction was unconstitutional were "facts supporting the claim" in § 2255(4). J.A. 33. By holding that the one-year limitations period in § 2255(4) began to run when Johnson became aware of the facts supporting his challenge to his state conviction, the Eleventh Circuit necessarily held that these are, in the language of § 2255(4), the "facts supporting the claim or claims presented" in Johnson's § 2255 motion. "Thus, the [Eleventh Circuit] panel-majority paradoxically asserts that federal courts are not the proper forum for litigating facts underlying a state conviction, but these very same facts can trigger the statute of limitations for federal habeas review." J.A. 51 (Barkett, J., dissenting).

By contrast, interpreting the word "facts" in § 2255 to mean the vacatur of Johnson's state conviction comports with *Daniels* and *Custis*. While the facts underlying Johnson's claim that his state conviction was unconstitutional do not create a basis for collateral attack at sentencing or in a § 2255 proceeding, the vacatur of his conviction is the "fact" that gives rise to his present § 2255 attack on his federal sentence.

B. The Eleventh Circuit's Rule Virtually Eliminates The Rights Established By *Custis* and *Daniels* As A Practical Matter

Custis and *Daniels* established a framework in which federal prisoners seeking to challenge state convictions used to enhance their federal sentences were routed first to state court. "After an enhanced federal sentence has been imposed pursuant to the ACCA, the person sentenced may pursue any

channels of direct or collateral review still available to challenge his prior conviction." *Daniels*, 532 U.S. at 382. In the rare event defendants are successful in such challenges, this Court acknowledged that they could return to federal court and apply for reopening of a federal sentence enhanced by the vacated state conviction. *See Custis*, 511 U.S. at 497; *Daniels*, 532 U.S. at 382.

Since this Court's pronouncement in *Custis*, eleven federal courts of appeals -- all of those to have considered the issue -- have allowed (or indicated they would allow) federal defendants to reopen their improperly enhanced federal sentences through § 2255. *See United States v. Clipper*, 313 F.3d 605, 608 (D.C. Cir. 2002); *United States v. Doe*, 239 F.3d 473, 475 (2d Cir. 2001) (per curiam); *United States v. Escobales*, 218 F.3d 259, 261 (3d Cir. 2000); *United States v. Walker*, 198 F. 3d 811, 813-814 (11th Cir. 1999) (per curiam); *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999); *United States v. LaValle*, 175 F.3d 1106, 1108 (9th Cir. 1999); *United States v. Pettiford*, 101 F.3d 199, 200-02 (1st Cir. 1996); *United States v. Bacon*, 94 F.3d 158, 161 n.3 (4th Cir. 1996); *United States v. Cox*, 83 F.3d 336, 339-40 (10th Cir. 1996); *United States v. Rogers*, 45 F.3d 1141, 1143 (7th Cir. 1995); *United States v. Nichols*, 30 F.3d 35, 36 (5th Cir. 1994) (per curiam).

The Eleventh Circuit's rule unfairly restricts this right to reopen improperly enhanced federal sentences under § 2255 by requiring the challenge to a state conviction to have been completed within one year after direct review of the federal case. As even the First Circuit conceded in *Brackett*, such a framework places a nearly impossible burden on defendants:

> [T]he net result of *Custis* and *Daniels* was to leave federal prisoners in a practical bind. They could not bring a § 2255 petition to federal court until they had gotten the state court convictions vacated and [under the *Brackett* court's view of § 2255(4)] they had only one year in which to accomplish that from the date of the federal conviction -- a daunting task.

270 F.3d at 67.

In this case, under the Eleventh Circuit's rule, if Johnson had filed his state habeas action on the day he was sentenced (November 18, 1994), he would have missed the statute of limitations (which, according to the Eleventh Circuit's rule, expired on April 23, 1997) because the state courts took two years and seven months to adjudicate his claim. Similarly, in *Gadsen*, if the defendant had filed his state post-conviction petition on the day he was sentenced, he would have missed the statute of limitations under the Eleventh Circuit's rule because the state courts took more than three years to adjudicate his claim. *Gadsen*, 332 F.3d at 228 ("Even if Gadsen had filed his state challenge the next day 'after [his] enhanced federal sentence [was] imposed,' he would not have been able to bring a § 2255 challenge within a year without violating *Daniels*, since it took more than three years for the South Carolina court system to reach final resolution on his challenge.").

Moreover, under the Eleventh Circuit's rule, state prosecutors have an incentive to drag out state proceedings so as to keep meritorious challenges from becoming final in time to meet the statute of limitations. For example, in *Gadsen*, one year from when the defendant's federal conviction became final fell in August 2000. *See Gadsen*, 332 F.3d at 225; *see also Clay v. United States*, 537 U.S. 522, 525 (2003). The South Carolina habeas court granted the defendant's petition for post-conviction relief on December

20, 1999. Thus, had that been the completion of Gadsen's state habeas case, he could have filed a § 2255 motion and satisfied the Eleventh Circuit's rule. However, the State in *Gadsen* sought review of the vacatur by the South Carolina Supreme Court, which was not denied until January 10, 2001. Thus, it was the State's filing of an appeal that caused the defendant to miss the one-year limitations period under the Eleventh Circuit's rule.

The Eleventh Circuit's rule is particularly troublesome because it means that Congress, in enacting AEDPA two years after *Custis*, intended to essentially eliminate the procedure established by the Court merely by using the word "fact" in § 2255(4). This Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (stating that courts must "presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles."); *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 403 n.3 (1984) (recognizing that statutes in derogation of common law are strictly construed). By contrast, Johnson's interpretation assumes that Congress used the word "facts" in § 2255(4) with an understanding of *Custis* and intending that the statute would be read in conformity with the procedure outlined in *Custis*.

Further, the Eleventh Circuit's rule presents litigants with an impossible choice: as a legal matter, they are not permitted to challenge predicate convictions in federal habeas; but as a practical matter, it is virtually impossible for them to challenge those convictions in state court and return to federal

court within the limitations period. The Eleventh Circuit seems to have been aware of this problem by noting that equitable tolling should be used if the petitioner acts with diligence and nonetheless finds that he has been shut out of federal court. J.A. 33 n.6. The Eleventh Circuit's use of equitable tolling, however, implicitly assumes that Congress wrote a flawed statute and that a doctrine such as equitable tolling is necessary to fix it. Such an interpretation should be rejected in favor of one that assumes Congress passed § 2255(4) with an understanding of *Custis* and without the need for equitable tolling. *See United States v. X-Citement Video*, 513 U.S. 64, 69-70 (1994) (statute is to be construed to avoid anomalies).

This Court has rejected readings of AEDPA that result in such a statutory anomaly. In *Carey v. Saffold*, 536 U.S. 214 (2002), this Court rejected an interpretation of "pending" in 28 U.S.C. § 2244(d)(2) that would have encouraged "state prisoners to file federal habeas petitions *before* the State completes a full round of collateral review." *Id.* at 220. "This would lead to great uncertainty in the federal courts, requiring them to contend with habeas petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense *required* by law (because they would otherwise be barred by the 1-year statute of limitations)." *Id.*

IV. THE ELEVENTH CIRCUIT'S RULE UNDERCUTS THE PRINCIPLES OF COMITY AND FEDERALISM

This Court has repeatedly stated that AEDPA is designed "to further principles of comity, finality, and federalism." *See, e.g., Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003); *Duncan v. Walker*, 533 U.S. 167, 178 (2001). The Eleventh Circuit

erred in placing undue emphasis on finality to the exclusion of comity and federalism. Moreover, as discussed in greater detail below, the interests of finality are not served by the Eleventh Circuit's rule.

This Court has defined federalism as "a system in which there is sensitivity to the legitimate interests of both State and National Governments . . . in which the National Government . . . always endeavors to [protect federal rights and interests] in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris,* 401 U.S. 37, 44 (1971). *Younger* defines comity as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a . . . belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.*

By exclusively focusing on finality without regard to comity or federalism, the Eleventh Circuit skewed the appropriate statutory analysis of § 2255(4), resulting in an overly narrow reading of the statute. This Court should give effect to AEDPA's additional legislative considerations of comity and federalism.

The Eleventh Circuit's decision effectively ignores the Georgia court's conclusive and final judgment that Johnson's predicate state conviction is invalid. As Judge Barkett stated in her dissent to the denial of the petition for rehearing en banc:

> The Supreme Court has stated that in the habeas context a federal court should not "deprive [a] state-court judgment of its normal force and effect." *Daniels*, 532 U.S. at 378. This is exactly what the panel-majority does by stripping the state court of the ability to exculpate criminal defendants.

J.A. 52-53 (some citations omitted).

Should the Eleventh Circuit rule be allowed to stand, the judgment of the Wayne County Superior Court that Johnson's predicate state conviction is unconstitutional will be denied its normal force and effect. As a result, the State of Georgia's ability to exculpate criminal defendants consistent with its post-conviction statutory scheme would be compromised. This undercuts the goal of honoring state court judgments consistent with the aims of federalism and comity. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 436 (2000) ("Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. . . . [W]e have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings."); *see also Coleman v. Thompson*, 501 U.S. 722, 726 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules . . . .")

Although finality is an important principle, it does not always override comity and federalism, or the interest in fundamental fairness. This Court has recognized the importance of "[s]tates' finality and comity interests while ensuring that 'fundamental fairness [remains] the central concern of the writ of habeas corpus.'" *Dretke v. Haley*, 124 S. Ct. 1847, 1852 (2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 697 (1984)). In this case, it is undisputed that Johnson presently remains in custody solely on the basis of a now-vacated state conviction, which has been set aside as

unconstitutionally obtained by a final, valid, and conclusive state court judgment. It is undisputed that Johnson followed the applicable state procedural rules in obtaining the vacatur of his prior state conviction. Having complied with the appropriate state process in successfully attacking his predicate conviction, as well as this Court's pronouncement in *Custis* that he should seek relief from the state court system, the Eleventh Circuit's rule would ignore the effect of that hard-won state court judgment and deny Johnson the right to present his § 2255 motion based on that judgment.

Finally, the Eleventh Circuit rule conflicts with the principles of comity and federalism because it improperly abridges a state's right to determine and apply its own system of post-conviction relief. In effect, the Eleventh Circuit's rule imposes on the states the federal one-year limitations period, even though the state systems charged with adjudicating the collateral state challenges routed to them under *Custis* and *Daniels* have rules providing different limitations periods. This is directly contrary to the notion that each state is entitled to establish its own procedures and limitations periods with respect to collateral challenges to prior state convictions, which periods, in many states, exceed one year.[7] Of course,

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[7] *See* Fla. R. Crim. P. 3.850(b) (no time limit), but presumption of laches applies to claims filed after more than five years, *see Mcray v. State*, 699 So.2d 1366 (Fla. 1997); Ind. Code. tit. 35 Post Conviction Rule PC-1 (no time limit); Iowa Code § 822.3 (three years); Ky. R. Crim. P. 11.42(10) (three years); Md. Code Ann. § 7-103(b) (ten years); Mass R. Crim. P. 30(a) (no time limit); Mich. Ct. R. 6.501-6.509 (no time limit); *Sykes v. State*, 578 N.W.2d 807, 814 (Minn. Ct. App. 1998) (no time limit); Neb. Rev. Stat. § 29-3001; N.J. Crim. P. 3:12-12 (no time limit); N.M. Stat. Ann. § 534.31 (no time limit); N.Y. C.P.L.R. § 7002 (no time limit); N.D. Cent. Code § 29-32.1-03 (no time limit); Okla.

in some states, the time available to collaterally challenge prior state convictions is less than one year.[8]

The point is that under *Custis* and *Daniels*, challenges to prior state convictions are first routed to the state court systems to be adjudicated according to state rules and procedures. Having been so routed, the federal courts must then respect the valid judgments that come back from the state courts, consistent with AEDPA's interest in comity and federalism. In addition to promoting the aims of comity and federalism, honoring state court judgments invalidating prior state convictions poses no risk of disrupting the finality of a state action because the state itself has decided to vacate the conviction. *See* J.A. 52.[9]

Stat. § 1089(D) (no time limit for non-capital cases); Tx. Crim. Pro. Art. 11.071 (time limit only for capital cases); Vt. Stat. Ann. tit. 13, § 7131; W. Va. Code § 53-4A-1(e) (no time limit); Wis. Stat. § 7-14-103 (five years). At the time Johnson sought state habeas as to his prior convictions, Georgia did not have a statute of limitations governing the filing his state petition. O.C.G.A. § 9-14-42 (1993). In 2004, Georgia amended its habeas statute by adding a four-year statute of limitations on a petition challenging a state felony conviction. O.C.G.A. § 9-14-42 (2004 Supp.).

[8] *See* Ariz. Rev. Stat. Ann. § 13-4231 (90 days); Ark. R. Cr. P. R. 37.2 (90 days); Mo. Ann. Stat. § 547.360(2) (90 days).

[9] Beyond general policies animating AEDPA, Petitioner is unaware of legislative history that explains in any meaningful way how Congress intended the phrase "facts supporting the claim" to be interpreted.

V. PRACTICAL CONSEQUENCES

A. The Eleventh Circuit's Rule Will Have Negative Consequences

If the Eleventh Circuit's construction of § 2255(4) is adopted by this Court, the statute of limitations for federal habeas will increase the burden on federal courts. Rather than promoting finality, the Eleventh Circuit's rule will force petitioners to file federal "placeholder" petitions so they will not be barred from later seeking relief under § 2255 while they first return to state courts to challenge their predicate state convictions. This will have the effect of flooding the federal courts with such placeholder petitions, the vast majority of which ultimately will be meritless and have no chance of success. *See Brackett v. United States*, 206 F. Supp. 2d 183, 186 n.3 (D. Mass. 2002) ("Thus, rather than have failure in the state court as a natural screen, the courts' approach results in thousands of meritless petitions being filed -- each which requires a case file be opened, orders issued, papers docketed, and the file stored."). The Eleventh Circuit rule shifts the burden back to the federal district courts in the first instance, who must serve as wards to placeholder petitions while state challenges wind their way through the state systems, a process which may take years. This is hardly consistent with this Court's focus on ease of administration and finality, as expressed in *Custis*, 511 U.S. at 496-97. *See Carey v. Saffold*, 536 U.S. 214, 220 (2002).

B. Johnson's Reading Yields Better Results

A much better policy, and one more consistent with the ease of administration rationale in *Custis*, is to construe § 2255(4) to permit petitioners to file challenges to enhanced federal sentences only *after* the convictions forming the basis

for those sentences have been vacated. *Cf. Duncan v. Walker*, 533 U.S. 167, 181 (2001) (noting "AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review"). The high rate of failure for habeas petitioners in the various state court systems will act as a natural filter, and only a small portion of the meritorious cases, as determined by the state courts, will ever make their way back to being filed and pursued in the federal courts. This result is also more consistent with the Court's directions *Custis* and *Daniels*: that petitioners must first seek redress in the state system and if they are successful, only then may they apply for the reopening of their federal sentences under § 2255.

In attacking Johnson's interpretation, the Government will no doubt argue that Johnson's suggested rule will result in more motions to reopen under § 2255 because, the argument goes, state vacaturs are relatively easy to obtain. The logic is as follows: the state has no incentive to contest such collateral challenges to prior state convictions, as the sentence associated with such convictions may have already been served. Furthermore, such challenges are often difficult to defend, given the passage of time and the unavailability of state court records. These arguments suffer from several flaws. First, the starting point of the argument -- that state vacaturs are easy to obtain -- is fundamentally incorrect. The Government has not shown that the number of state vacaturs of prior state convictions used to enhance federal sentences is substantial. If anything, the statistics support the contrary conclusion: that the rate of failure on state habeas is extremely high.[10] Again, this militates in favor of fewer § 2255

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[10] For instance, in 1992, the habeas corpus petitioner success rate before the Texas Court of Criminal Appeals was estimated to be

motions, not more. If the Government's supposition was correct --that motions to reopen would dramatically increase were Petitioner's reading adopted -- one would expect to see such an increase in the Fourth Circuit, where *Gadsen* is the law. However, the number of habeas petitions and § 2255 motions filed in the Fourth Circuit actually decreased from 2003 to 2004.[11]

In addition, this Court already has rejected the notion that states have no real interest in preserving prior convictions. *See Daniels*, 522 U.S. at 379-80 ("[A] State retains a strong interest in preserving the convictions it has obtained. States impose a wide range of disabilities on those who have been convicted of crimes, even after their release. . . . Thus, the State does have a real and continuing interest in the integrity of its judgments."). In this case, such interest was evidenced

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less than eight percent. *See* Victor E. Flango, Habeas Corpus in State and Federal Courts at 61 n.75 (1994), *available at* http://www.ncsconline.org/WC/Publications/KIS_StaFedHabCorpStFedCts.pdf. The Flango study reviewed habeas petitions terminated in 1990 and 1992 in the highest courts in Alabama, California, and Texas; two intermediate appellate courts and a trial court in New York (too few cases reached New York's court of last resort); and two district courts in each state. *See id.* at 27-29, 58. Of the 1,195 petitions reviewed from Alabama, California, and New York, only 51 were granted and 48 of those came from New York. *See id.* at 61.

[11] For the 12-month periods ending on March 31, 2004 the total "habeas corpus general" and "motion to vacate sentence" petitions decreased by almost 2% in the Fourth Circuit in 2004 as compared to 2003. *Compare* Table C-3, Federal Judicial Caseload Statistics 2004 (Mar. 31, 2004), *with* Table C-3, Federal Judicial Caseload Statistics 2003 (Mar. 31, 2003), *both available at* http://www.uscourts.gov/library/statisticsalreports.html.

by the State of Georgia's opposition to Johnson's state habeas petition; if there had been no real interest on the part of the State, the State would not have responded. States have an interest in prior convictions because they, like the federal government, usually have statutes increasing penalties for two or three "strikes" or other laws increasing sentences for recidivists. *See, e.g.*, O.C.G.A. § 17-10-7; Mich. Comp. Laws Ann. § 769.10 *et seq.* Further, states that impose capital punishment often consider a history of certain convictions as an aggravating factor militating in favor of imposing the death penalty. *See, e.g.*, O.C.G.A. § 17-10-30(b)(1); Ariz. Rev. Stat. § 13-703.

Finally, the concern over absent records is unavailing. Unlike *Custis* and *Daniels*, it is not the federal courts that must obtain the state court records to assess the validity of underlying constitutional challenges to prior state court convictions, but the state courts who must retain and review such records to adjudicate collateral challenges. The state courts, as the custodians of such records, are better equipped to retrieve and review such records, a notion underpinning this Court's rationale in *Custis* and *Daniels*. Furthermore, consistent with the aims of comity and federalism, it is up to each individual state and state court system to develop sufficient laws, policies, and procedures for recordkeeping and retention of records in criminal cases.

As discussed *supra*, most states have passed statutes of limitations on state habeas claims -- thus addressing on their own the issue of stale records and delayed collateral attacks. *See supra* note 7. The fact is that, with the growing trend of state habeas statutes of limitations, there is less risk of stale records.

Importantly, however, it is the States that should be permitted to make a policy choice about whether the risk of absent or stale records is outweighed by the risk that someone may be incarcerated on unconstitutional grounds. It should not be the place of the federal courts to second guess state judgments or to penalize prisoners who have faithfully followed the rules established by the legislative or judicial decisions of the individual states.

In the end, Johnson, who has already served the term of imprisonment he would have received without enhancement for his prior conviction, currently is in prison based on a conviction Georgia has conclusively determined was unconstitutional.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court reverse the Eleventh Circuit's Opinion, hold that Johnson has complied with the statute of limitations in § 2255(4), and remand the case for consideration of the merits of Johnson's § 2255 motion to vacate.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 2255 states:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of–

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme

Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Supreme Court, U.S.
FILED
DEC 17 2004
OFFICE OF THE CLERK

No. 03-9685

In the Supreme Court of the United States

ROBERT JOHNSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, when a federal prisoner whose sentence was enhanced on the basis of a state-court conviction files a motion to vacate the sentence on the ground that the state-court conviction has been vacated, the one-year limitation period under 28 U.S.C. 2255 para. 6(4) runs from the date on which the state-court conviction was vacated.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 22-46) is reported at 340 F.3d 1219. The order of the district court (J.A. 18-20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2003. A petition for rehearing was denied on December 22, 2003 (J.A. 48-53). The petition for a writ of certiorari was filed on March 22, 2004, and granted on September 28, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Paragraph 6 of Section 2255 of Title 28 of the United States Code provides as follows:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT

1. a. Various provisions of federal law require a district court to impose an enhanced sentence if the defendant has prior convictions for certain types of offenses. For example, under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), defendants found guilty of certain firearms offenses are subject to a mandatory minimum prison term of 15 years if they

have three prior convictions for a "violent felony" or "serious drug offense." Similarly, under the "career offender" provision of the United States Sentencing Guidelines, adult defendants found guilty of a felony "crime of violence" or "controlled substance offense" are subject to an enhanced offense level and automatic placement in criminal history category VI if they have at least two prior felony convictions for a crime of violence or controlled substance offense. Sentencing Guidelines § 4B1.1.

Defendants sentenced under laws of this type frequently file collateral attacks on the validity of a prior state conviction used to enhance the federal sentence. This Court has twice addressed the question of where a defendant sentenced under the ACCA may bring such a challenge. In *Custis* v. *United States*, 511 U.S. 485 (1994), the Court held that the federal sentencing proceeding is not the proper forum for a collateral attack on a prior state conviction. In *Daniels* v. *United States*, 532 U.S. 374 (2001), the Court held that a post-conviction proceeding under 28 U.S.C. 2255 is not the proper forum.[1] Since this Court's decision in *Custis*, the courts of appeals have uniformly concluded that a federal prisoner who has successfully attacked a prior state conviction in an appropriate forum (generally a post-conviction proceeding in state court) may bring a Section 2255 motion challenging a federal sentence that

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[1] In both cases, the Court made an exception for convictions that were uncounseled in violation of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). See *Daniels*, 532 U.S. at 382; *Custis*, 511 U.S. at 487. The plurality in *Daniels* also left open the possibility that Section 2255 would be available in "rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own." 532 U.S. at 383 (opinion of O'Connor, J.).

was enhanced on the basis of the since-vacated state conviction. See, *e.g.*, *United States* v. *Doe*, 239 F.3d 473, 475 (2d Cir. 2001) (per curiam) (citing cases).

Federal prisoners who seek to have a prior state-court conviction vacated in order to challenge a federal recidivist sentence often file the state-court motion many years after the federal sentence has become final. Delaying a challenge to the state conviction can dramatically increase the likelihood of success, since a state prosecutor may be either unable to defend an old conviction (because of the difficulty or impossibility of locating transcripts and other relevant records) or unwilling to do so (because of the likelihood that the defendant will have long since completed his state sentence and that vacating the conviction will immediately affect only the length of his federal sentence). In a case that typifies this situation, a federal prisoner's "state court collateral attack upon a nineteen-year old state manslaughter sentence was not contested by the state executives at hearing." *United States* v. *Walker*, 198 F.3d 811, 814 (11th Cir. 1999) (Hill, J., concurring).

b. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, no statute of limitations governed motions for collateral relief under 28 U.S.C. 2255. Under the pre-AEDPA law, a federal prisoner could file such a motion "at any time," 28 U.S.C. 2255 para. 2 (1994), and the government was entitled to have the motion dismissed as untimely only if it was "prejudiced in its ability to respond to the motion by delay in its filing," Rule 9(a) of the Rules Governing § 2255 Proceedings. As a result, a prisoner could "wait a decade" or more after his conviction before seeking collateral relief. *Lindh* v. *Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997).

To "curb the lengthy delays in filing" that "often occur in federal habeas corpus litigation," H.R. Rep. No. 23, 104th Cong., 1st Sess. 9 (1995), Congress added a statute of limitations when it enacted the AEDPA. Section 105 of the law, 110 Stat. 1220, which is codified in paragraph 6 of 28 U.S.C. 2255, establishes a "1-year period of limitation" for motions brought under Section 2255. The period runs from "the latest" of a number of events, which are set forth in subparagraphs (1) through (4) of paragraph 6.

The general rule, found in subparagraph (1), and interpreted by this Court in *Clay* v. *United States*, 537 U.S. 522 (2003), is that the triggering date is "the date on which the judgment of conviction becomes final."[2] Three exceptions to that rule permit the one-year limitation period to begin later. Under the exception found in subparagraph (2), the one-year period begins to run on "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action." Under the exception found in subparagraph (3), the provision at issue in *Dodd* v. *United States*, cert. granted, No. 04-5286 (Nov. 29, 2004), the one-year period begins to run on "the date on which the right asserted was initially recognized by the

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[2] The AEDPA took effect on April 24, 1996, but in cases (like this one) in which the judgment of conviction became final before that date, the courts of appeals have uniformly afforded the prisoner one year from the AEDPA's effective date within which to file a Section 2255 motion. See, *e.g.*, *Rogers* v. *United States*, 180 F.3d 349, 353-354 & n.9 (1st Cir. 1999) (citing cases), cert. denied, 528 U.S. 1126 (2000).

Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." This case involves the exception found in subparagraph (4), under which the one-year period begins to run on "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."[3]

2. On six occasions in 1993 and 1994, petitioner sold cocaine base to undercover law-enforcement officers in Lenox, Georgia. Petitioner made some of the sales while he was on weekend furloughs from the Cook County, Georgia, Jail, where he was serving a sentence for a prior state drug offense. PSR ¶¶ 9-15, 60-61.

3. A grand jury in the Middle District of Georgia returned an indictment charging petitioner with one count of conspiracy to possess cocaine base with the intent to distribute it, in violation of 21 U.S.C. 846, and five counts of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Pursuant to a plea agreement, petitioner pleaded guilty to a single count of distribution. Gov't C.A. Br. 2; PSR ¶¶ 1-2, 5-6.

In the Presentence Investigation Report (PSR), the Probation Office determined that petitioner had at least eight prior convictions, which resulted in a total of 20 criminal history points and placed him in criminal history category VI. PSR ¶¶ 39- 64. The Probation Office also determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1, based on two 1989 convictions in Cook County, Georgia, Superior Court for distribution of cocaine. PSR ¶¶ 32-33, 52-55, 65. In both cases, the PSR noted, petitioner had "waived counsel," pleaded guilty to the charge, and received a sentence of probation. PSR ¶¶ 52-55. Petitioner's offense level under the career-offender provision was 32 and, with a 3-level reduction for acceptance of responsibility, the applicable Guidelines range was 151 to 188 months of imprisonment. PSR ¶¶ 32-36, 79.

Petitioner filed written objections to the PSR, including an objection to his classification as a career offender, but he did not explain the basis for the objection. At the sentencing hearing, petitioner's counsel advised the district court that the objections to the PSR were being withdrawn, and petitioner confirmed that he did not wish to pursue his objections. The district court sentenced petitioner as a career offender, and imposed a prison term of 188 months. J.A. 23; Gov't C.A. Br. 4; PSR Add. 1.

4. On December 22, 1995, the court of appeals affirmed petitioner's sentence. J.A. 7-8. In his appeal, petitioner argued that his prior state-court convictions were based on guilty pleas entered without a valid waiver of his right to counsel, and that he therefore should not have been sentenced as a career offender. *Ibid.* Because petitioner had waived his objection to the career-offender classification at sentencing, the court of appeals declined to consider whether his prior convictions were valid. J.A. 8. On April 22, 1996, this Court denied certiorari. 517 U.S. 1162.

5. On February 6, 1998, petitioner filed a petition for a writ of habeas corpus in Wayne County, Georgia,

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[3] The AEDPA also added a statute of limitations, codified at 28 U.S.C. 2244(d)(1), for habeas corpus petitions filed by state prisoners. It is identical in substance, though not in its language, to the statute of limitations for federal prisoners. The state prisoners' counterpart of the provision at issue here is 28 U.S.C. 2244(d)(1)(D), which states that the one-year limitation period runs from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

Superior Court, challenging seven of his prior state convictions on the ground that he had not validly waived his right to counsel at the guilty plea hearings in those cases. J.A. 9, 24. On October 24, 2000, in a brief order, the trial court granted the petition and vacated petitioner's convictions. J.A. 9-10, 24. Noting that the State had responded to the petition by denying the allegations but had not "filed any further transcripts of the hearings," the Superior Court found that "the record in these cases does not show an affirmative waiver of [petitioner's] right to an attorney." J.A. 10. One of the seven convictions vacated by the state court was one of the two that served as the basis for petitioner's classification as a career offender. Compare J.A. 9 with PSR ¶¶ 33, 52, 54.

6. On February 13, 2001, petitioner filed a motion under 28 U.S.C. 2255, claiming that, because his state convictions had been vacated, he no longer qualified as a career offender. J.A. 24. Petitioner contended that his motion was timely because the state court's order granting his habeas corpus petition "constitute[d] new evidence which did not exist and could not have been discovered" earlier, and the one-year time limit therefore began to run on the date the court issued its ruling. Mem. in Support of Mot. to Vacate, Set Aside or Correct Sentence 3.

A magistrate judge recommended that petitioner's Section 2255 motion be denied as untimely. J.A. 11-17. The district court adopted the magistrate judge's report and recommendation and denied the motion, holding that the AEDPA's one-year limitation period expired on April 24, 1997, a year after petitioner's federal conviction became final by virtue of this Court's denial of certiorari. J.A. 18-20. The court noted that petitioner had waited 21 months from the denial of

certiorari to file his state-court habeas corpus petition, and that "a period of almost five * * * years [had] passed before he eventually filed his Section 2255 motion." J.A. 19-20. The district court denied petitioner's motion for a certificate of appealability, but the court of appeals issued one, limited to the question whether petitioner's Section 2255 motion was timely. J.A. 4, 24.

7. A divided panel of the court of appeals affirmed. J.A. 21-46.

a. The majority rejected petitioner's claim that the one-year limitation period did not commence until October 24, 2000, when the state court vacated his prior convictions. Relying on the First Circuit's decision in *Brackett* v. *United States*, 270 F.3d 60 (2001), cert. denied, 535 U.S. 1003 (2002), see J.A. 27-31, the majority held that "a state court's vacatur of a federal prisoner's prior state convictions is not a 'fact supporting the claim or claims' under § 2255 ¶ 6(4) from which [the] AEDPA's statute of limitation will run," J.A. 33. Unlike the fact that petitioner did not validly "waive[] his right to counsel before pleading guilty to the state charges," J.A. 27, the majority explained, "the vacatur of prior state convictions is a court action obtained at the behest of a federal prisoner, not [a fact] 'discovered' by him," J.A. 28. Noting the AEDPA's "clear legislative purpose" of "ensur[ing] a greater degree of finality for convictions," J.A. 29, the majority also reasoned that petitioner's interpretation of Section 2255 para. 6(4) would "run directly counter to the general congressional intent behind [the] AEDPA and indefinitely extend the opportunity for post-conviction challenges," J.A. 30. Because petitioner "knew all of the facts supporting his challenge to his state convictions before his federal conviction became final," and because he filed

his Section 2255 motion more than three years after the expiration of the one-year grace period running from the AEDPA's effective date, the majority determined that petitioner's motion was untimely. J.A. 33.

The majority also held that petitioner was not entitled to equitable tolling of the one-year limitation period, because he could not show that his delay in filing the Section 2255 motion was "the result of extraordinary circumstances that were beyond his control even with the exercise of due diligence." J.A. 34. The majority observed that a prisoner in a case of this type could be eligible for equitable tolling if he diligently pursued his state claim and was unable to obtain a decision from the state court before the expiration of the limitation period solely because of the court's delay. J.A. 37. In holding that equitable tolling was unavailable in this case, the court explained that petitioner "was plainly aware of whatever facts supported his collateral attack on his prior state convictions at the time his federal sentence became final," J.A. 34, and yet he "did nothing [before or] during the one-year AEDPA grace period to attack [the] prior convictions," J.A. 37.

b. Judge Roney dissented. J.A. 40-46. In his view, the limitation period under paragraph 6(4) runs from the date of the state court's order, because a decision vacating a prisoner's prior conviction is a "fact" that is not "discoverable" until the court issues its decision. J.A. 41. Judge Roney would have followed the Fourth Circuit's decision in *United States* v. *Gadsen*, 332 F.3d 224 (2003), so holding. J.A. 40.[4]

[4] In an opinion dissenting from the denial of rehearing en banc (J.A. 50-53), Judge Barkett agreed with the views expressed by Judge Roney in his panel dissent and by the Fourth Circuit in *Gadsen*.

SUMMARY OF ARGUMENT

The court of appeals correctly held that petitioner's Section 2255 motion was untimely.

A. Petitioner contends that, when a federal prisoner challenges a recidivist sentence enhancement on the ground that the prior state conviction has been vacated, the one-year limitation period commences under 28 U.S.C. 2255 para. 6(4) on the date the state conviction is vacated. As an initial matter, petitioner's interpretation is inconsistent with the statutory text. Paragraph 6(4) provides that the limitation period runs from the date on which the "fact[] supporting the claim" in the Section 2255 motion "could have been discovered." A court order is obtained at the moving party's behest, not "discovered" by him.

Petitioner defends his interpretation on the ground that a court order can be "discovered" after it is issued. But that is not the type of discovery that Congress had in mind. Since a party will almost always know about a court order it has procured as soon as the order is issued, it would make little sense for a limitation period to be triggered by the discovery of the order. That view is confirmed by the fact that, under two other subparagraphs of Section 2255's limitation provision, the one-year period commences with the issuance, not the discovery, of a judicial decision. See 28 U.S.C. 2255 para. 6(1) (this Court's affirmance of conviction or denial of certiorari); *id.* para. 6(3) (this Court's initial recognition of right asserted). The triggering date under paragraph 6(4), moreover, is not the date on which the fact supporting the claim was discovered, but the date on which it could have been discovered "through

the exercise of due diligence," a textual limitation that reflects Congress's intent that Section 2255 motions be filed expeditiously. Petitioner's interpretation, which requires a prisoner to exercise due diligence in discovering the order once it is issued, but not in taking the steps necessary to obtain the order, deprives the "due diligence" requirement of nearly all its force.

Petitioner's interpretation of paragraph 6(4) also undermines the purpose of Section 2255's limitation provision, which is to "reduce[] the potential for delay on the road to finality." *Duncan* v. *Walker*, 533 U.S. 167, 179 (2001). Under petitioner's interpretation, federal prisoners in cases of this type will have an incentive to *increase* the delay in challenging a prior state conviction, and thus in challenging the federal sentence, because the passage of time increases the likelihood that records will be unavailable and that the State will be uninterested in defending a conviction for which the sentence has long since been served.

Petitioner claims that his interpretation furthers the principles of comity and federalism, by ensuring that state courts are able to "exculpate criminal defendants." Br. 35. But petitioner will remain exculpated of the state crime whether or not his challenge to the federal sentence goes forward, and the question whether the federal sentence may be challenged is a matter of federal, not state, concern. Moreover, in a context in which the main effect of vacating a state conviction is on a federal sentence (so much so that state officials often have little incentive to oppose the state-court motion), principles of comity and federalism should not lead federal courts to ignore society's interest in the finality of federal sentences.

Under the correct interpretation of paragraph 6(4), the one-year limitation period runs from the date the

facts that form the basis for the motion to vacate the prior state conviction were discoverable in the exercise of due diligence. Unlike the order granting the motion to vacate the state conviction, the facts that form the basis for the motion are both facts that can be "discovered" and facts that, if pursued with "due diligence," will ordinarily lead to the prompt filing of a Section 2255 motion.

Contrary to petitioner's contention, the government's interpretation of paragraph 6(4) does not make it "virtually impossible" (Br. 32) for a prisoner to comply with the statute of limitations. Petitioner suggests that the delay between the filing of a motion to vacate a state conviction and the order granting it will generally be more than one year. But the factual basis for the state motion is typically discoverable at the time of the asserted violation, which is usually years before the federal conviction becomes final, and even when it is not discoverable until the federal sentencing, the prisoner will still have the length of the federal direct-appeal process plus an additional year to challenge the state conviction. In a case in which the factual basis for the state claim is not discoverable until *after* the federal conviction has become final, the prisoner may still be able to obtain vacatur of the state conviction within a year. And in a case in which the state court's delay prevents a prisoner from obtaining vacatur of the state conviction within a year of the date the federal conviction became final or the date the factual basis for the state claim was discoverable, the prisoner may be eligible for equitable tolling.

B. Even if, as petitioner contends, the "fact[] supporting the claim" whose imputed discovery triggers the limitation period is the vacatur of the state conviction, the limitation period under paragraph 6(4) does

not run from the date the vacatur was obtained. It runs from the date the vacatur *could have been* obtained if the prisoner had exercised due diligence. If the factual basis for the state claim could have been discovered earlier, or the state-court motion could have been filed earlier, then the date the court order vacating the state conviction could have been obtained, and thus "discovered," will be earlier than the date it was issued. This alternative interpretation is consistent with the text and purpose of paragraph 6(4), and it avoids petitioner's principal objections to the other interpretation.

C. Under either interpretation of paragraph 6(4), petitioner's Section 2255 motion was untimely. If the limitation period under that provision runs from the date the factual basis for the state-court motion could have been discovered, petitioner's Section 2255 motion was filed nearly four years too late, because he was aware of the factual basis for the state claim before the AEDPA's effective date (the triggering date under paragraph 6(1)) and the Section 2255 motion was filed nearly five years afterwards. If the limitation period under paragraph 6(4) runs from the date the vacatur of the state conviction could have been discovered with due diligence, petitioner's Section 2255 motion was untimely because the factual basis for petitioner's state claim was discoverable by December 1995 (at the latest); petitioner could have filed his state-court motion by December 1996 (and probably would not have required a full year to do so); the motion could have been granted, and thus "discovered," by August 1999 (assuming the court took the same amount of time to decide the motion that it took when the motion was filed); and petitioner did not file his Section 2255 motion until February 2001.

ARGUMENT

PETITIONER'S MOTION UNDER 28 U.S.C. 2255 WAS UNTIMELY

A motion under 28 U.S.C. 2255 must be filed within one year of the latest of four dates, including "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. 2255 para. 6(4). Petitioner's Section 2255 motion challenges his federal sentence on the ground that a prior state conviction used to enhance the sentence has been vacated. He contends that the one-year limitation period under paragraph 6(4) of Section 2255 ran from the date the state court vacated the prior conviction.

Petitioner is mistaken. In a case of this type, the "fact[] supporting the claim" whose imputed discovery triggers the limitation period is not the order vacating the state conviction, but the fact that forms the basis for the motion to vacate the state conviction. Thus, the one-year period begins to run on the date on which the prisoner, in the exercise of due diligence, could have discovered the facts supporting his challenge to the state conviction. Even if the triggering event were the imputed discovery of the court order, the date the order "could have been discovered through the exercise of due diligence" would not be the date the order was in fact obtained, but the date it *could have been* obtained. Under either view, petitioner's Section 2255 motion was untimely.

A. The "Fact[] Supporting The Claim" Whose Imputed Discovery Triggers The Limitation Period Under 28 U.S.C. 2255 Para. 6(4) Is The Fact That Forms The Basis For The Motion To Vacate The State Conviction, Not The Order Vacating The State Conviction

1. Petitioner's interpretation is inconsistent with the text of 28 U.S.C. 2255 para. 6(4)

a. Much of petitioner's brief is devoted to the argument that the court order vacating his state conviction is the "fact" that "support[s] the claim" in his Section 2255 motion. See Br. 18-29. Petitioner reasons that, if a conviction is a "fact," then vacatur of the conviction must be as well, and that, because *Daniels* v. *United States*, 532 U.S. 374 (2001), makes clear that a prisoner may not challenge his federal sentence under Section 2255 until the state conviction has been vacated, it is the vacatur of the conviction that "support[s]" the claim. Even if petitioner is correct that the vacatur is a fact supporting his claim, it does not follow that the vacatur of the conviction is the event from which the limitation period runs under paragraph 6(4). Under that provision, the limitation period commences when the fact supporting the claim "*could have been discovered through the exercise of due diligence*." That means that it is not the fact itself that triggers the limitation period, but the *discovery*—or, more precisely, the imputed discovery—of the fact. And a court order is not a fact that is "discovered" by the party who requests it.

As petitioner acknowledges (Br. 24), the noun "discovery" means "the act, process, or an instance of gaining knowledge of or ascertaining the existence of something previously unknown or unrecognized." *Webster's Third New International Dictionary* 647 (1993). Similarly, the verb "discover" means "to make known

(something secret, hidden, unknown, or previously unnoticed)." *Ibid.* To "discover," therefore, is to find something that exists, but whose existence or location was previously unknown. "Discovery" is distinct from the process of generating or manufacturing something that previously did not exist. That trial counsel had a conflict of interest, that the prosecution withheld exculpatory evidence, or that (as petitioner claimed in his state-court motion) there was not a valid waiver of the right to counsel—each of these is a preexisting fact that a federal prisoner might discover. A court order vacating a conviction is not. It is something that is brought into existence as a result of the prisoner's own actions—the filing of a motion and request for relief.

"When interpreting a statute, [a court] must give words their 'ordinary or natural' meaning." *Leocal* v. *Ashcroft*, 125 S. Ct. 377, 382 (2004) (quoting *Smith* v. *United States*, 508 U.S. 223, 228 (1993)). As the First Circuit explained in *Brackett* v. *United States*, 270 F.3d 60 (2001), cert. denied, 535 U.S. 1003 (2002), "[i]t would be an odd usage," not an ordinary or natural one, to say that a court order "could have been discovered" by a prisoner, because it is "obtained at [his] behest." *Id.* at 68. The court below reached the same conclusion. See J.A. 28 ("the vacatur of prior state convictions is a court action obtained at the behest of a federal prisoner, not 'discovered' by him").

b. Petitioner does not dispute that a party who takes the steps necessary to obtain a court order is not ordinarily said to "discover" it. He does contend, however (Br. 24), that the party who requests the order can "discover" it after the order has been issued. "It is conceivable," petitioner says, "that a defendant might not 'discover' a vacatur (or other court ruling) when it issues—e.g., if the prisoner is incarcerated and is not

provided notice of the ruling." *Ibid.* That example may reflect a conceivable meaning of "discover," but for at least two reasons, it does not reflect the type of discovery contemplated by paragraph 6(4).

First, it would make little sense for the triggering date for a limitation period to be the date the issuance of a court order could have been discovered, since a court order is a public document that is readily available—particularly to the parties, on whom the order is served. Indeed, paragraph 6 of Section 2255 itself makes clear that, when the one-year limitation period runs from the date of a judicial decision, Congress intended the triggering date to be the date of the decision, not the date on which it could have been discovered by the prisoner. Paragraph 6(1) provides that the limitation period runs from "the date on which the judgment of conviction becomes final," and that date, if a certiorari petition is filed, is the date on which this Court "affirms a conviction on the merits on direct review or denies [the] petition for a writ of certiorari," *Clay* v. *United States*, 537 U.S. 522, 527 (2003). Paragraph 6(3) provides that the limitation period runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Paragraph 6 does *not* provide that the triggering date is the date on which the finality of the judgment of conviction, or this Court's initial recognition of the right asserted, could have been discovered through the exercise of due diligence. Accordingly, if the imputed discovery of the court order vacating a conviction triggered the limitation period under paragraph 6(4), as petitioner contends, court orders would be treated differently under paragraph 6(4) than under paragraphs 6(1)

and 6(3). There is no reason to suppose that Congress intended such a result.[5]

Second, the triggering date under paragraph 6(4) is not the date on which the fact was discovered, but the date on which it "could have been" discovered "through the exercise of due diligence." The requirement that a prisoner exercise "due diligence" in discovering the factual predicate of his claim is one of the textual manifestations of Congress's intent that Section 2255 motions be prepared and filed expeditiously (a legislative purpose that is discussed in more detail below, see pp. 20-24, *infra*). If all the phrase "due diligence" meant in paragraph 6(4) was that, in a case of this type, a prisoner must exercise due diligence in discovering whether his motion has been decided, it would defeat that intent. Under petitioner's interpretation, a prisoner who took years to discover a factual basis for challenging a state conviction that could have been discovered within months, and then took years to file a motion to vacate the conviction that could have been filed within months, would be able to comply with the statute of limitations as long as he exercised "due diligence" in noticing the order that vacated his conviction and then filed his Section 2255 motion within a year. By requiring due diligence at the back end of the process (and only as to a "fact" of public record), but not at the front end (with respect to ordinary historical facts that can be discovered), petitioner's interpretation

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[5] Paragraph 6 as a whole is thus consistent with the understanding that judicial orders and decisions are not the kind of "facts" that can be discovered for purposes of Section 2255's statute of limitations. Rather, litigants are presumed to know about orders and decisions, and federal courts need not entertain litigation about whether the "fact" of a helpful precedent could have been discovered through the exercise of due diligence.

deprives the requirement of "due diligence" of virtually all its force. To avoid that result, the requirement should not be read to apply to the discovery of the court order.

2. Petitioner's interpretation undermines the purpose of the limitation provision of 28 U.S.C. 2255

a. As this Court has observed, and as petitioner acknowledges (Br. 33), "[t]here is no doubt" that Congress's purpose in enacting the AEDPA was "to further the principles of comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). Accord *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003); *Carey* v. *Saffold*, 536 U.S. 214, 222 (2002). In *Duncan* v. *Walker*, 533 U.S. 167 (2001), the Court explicitly recognized that that purpose motivated the adoption of the AEDPA's one-year limitation period for habeas corpus petitions filed by state prisoners, 28 U.S.C. 2244(d)(1). The statute of limitations, the Court said, "quite plainly serves the well-recognized interest in the finality of state court judgments." 533 U.S. at 179. In particular, it "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Ibid.* While *Duncan* v. *Walker* involved the limitation provision for state prisoners, it is clear that the limitation provision for federal prisoners was motivated by the same legislative purpose, because the text of the state provision is nearly identical to that of the federal provision, see *Clay* v. *United States*, 537 U.S. at 528, and "the Federal Government, no less than the States, has an interest in the finality of its criminal judgments," *United States* v. *Frady*, 456 U.S. 152, 166 (1982).

As both the First Circuit in *Brackett* and the court below concluded, see 270 F.3d at 69-70; J.A. 29-30, petitioner's interpretation of paragraph 6(4) is fundamentally at odds with that purpose, because, far from "reduc[ing] the potential for delay on the road to finality," *Duncan* v. *Walker*, 533 U.S. at 179, petitioner's interpretation increases it. Under his view of paragraph 6(4), a prisoner can wait as long as he wants to seek vacatur of a prior state conviction, so long as the Section 2255 motion is filed within a year of the date on which the state conviction is vacated. That approach effectively eliminates any meaningful statute of limitations for motions of this type.

Moreover, petitioner's reading actually creates incentives to delay. "As time passes, and certainly once a state sentence has been served to completion, the likelihood that trial records will be retained by the local courts and will be accessible for review diminishes substantially." *Lackawanna County Dist. Attorney* v. *Coss*, 532 U.S. 394, 403 (2001). The passage of time also increases the likelihood that the State will "show[] no interest" in defending a conviction for which the defendant has long since completed his sentence. *United States* v. *Walker*, 198 F.3d 811, 814 (11th Cir. 1999) (Hill, J., concurring). See also *Brackett*, 270 F.3d at 63 (state "agreed to the motions" to vacate seven- and nine-year-old convictions). Under petitioner's interpretation of paragraph 6(4), federal prisoners will thus have "incentives to delay * * * their challenges to their state court convictions, and particularly to wait until the state ha[s] destroyed the trial or plea records, thus making it easier in some instances to obtain an order vacating the conviction." *Brackett*, 270 F.3d at 70. And the longer the delay in challenging a state conviction, the longer the delay in filing the Section 2255 motion. Indeed, by creating an incentive to delay challenges to state convictions, petitioner's interpretation

"work[s] against [the] finality" of state-court judgments as well as federal ones. *Ibid.*[6]

b. Petitioner does not claim that his interpretation of Section 2255's limitation provision furthers "the well-recognized interest in the finality of [criminal] judgments." *Duncan* v. *Walker*, 533 U.S. at 179. Instead, petitioner contends that the court of appeals "plac[ed] undue emphasis on finality to the exclusion of comity and federalism" (Br. 34), and that his interpretation of paragraph 6(4) serves the principles of comity and federalism. Quoting Judge Barkett's dissent from the denial of rehearing en banc, petitioner argues as follows:

> The Supreme Court has stated that in the habeas context a federal court should not "deprive [a] state-court judgment of its normal force and effect." *Daniels*, 532 U.S. at 378. This is exactly what the panel-majority does by stripping the state court of the ability to exculpate criminal defendants.

Br. 34-35 (quoting J.A. 52-53).

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[6] Petitioner's interpretation not only works against the purpose of Section 2255's limitation provision, it works against the purpose of federal laws like the ACCA and the Guidelines' career-offender provision, which is to ensure that "career" criminals receive the most severe punishment. See, *e.g.*, 28 U.S.C. 994(h) (directing Sentencing Commission to ensure sentences for career offenders "at or near the maximum term authorized"). When a prisoner who delays a challenge to a state conviction is successful in having the conviction vacated, his success is often attributable to the fact that the State is no longer able or willing to defend the conviction, not to the fact that the prisoner is innocent or that his conviction was unlawfully obtained. If the prisoner is then able to use the vacatur of his state conviction to obtain a reduced federal sentence, the result will be a lower sentence than Congress intended for the worst recidivists.

That view is misguided. *Daniels* said that a state-court judgment would be deprived of its "normal force and effect" if the Court countenanced "collateral attacks" on prior state convictions in Section 2255 motions in federal court. 532 U.S. at 378 (quoting *Custis* v. *United States*, 511 U.S. 485, 497 (1994)). Unlike a successful collateral attack on a conviction, rejection of petitioner's interpretation of paragraph 6(4) will not invalidate the judgment that vacated his conviction, and indeed will have no effect on that judgment at all. The court of appeals' decision thus does not prevent state courts from "exculpat[ing] criminal defendants." Pet. Br. 35 (quoting J.A. 53).

At bottom, petitioner seems to be arguing that it would violate principles of comity and federalism for a federal court to refuse a request to reduce a federal sentence after a state court has vacated a state conviction used to enhance the federal sentence. See Br. 34-35, 37. But the effect of the vacatur of a state-court conviction on a federal sentence, and any limitations on a federal prisoner's ability to seek a reduction of the sentence, are matters of federal, not state, concern. That principle is manifest in the fact that federal sentences *may* rely on vacated state convictions unless the basis for the vacatur fits within certain specified categories. See, *e.g.*, 18 U.S.C. 3559(c)(7) (defendant sentenced under federal "three strikes" statute is entitled to resentencing only if prior conviction that was basis for sentence "is found * * * to be unconstitutional or is vitiated on the explicit basis of innocence"); Sentencing Guidelines § 4A1.2, comment. (n.10) (no prohibition on enhancing federal sentence on basis of prior conviction vacated by state court if conviction was set aside "for reasons unrelated to innocence or errors of law"); *United States* v. *Cox*, 83

F.3d 336, 339-340 (10th Cir. 1996) (reopening of federal sentence turns on district court's determination of basis for state court's vacatur of prior convictions).

Indeed, the federal interest in the vacatur of a long-since-served state conviction in many cases is much greater than any remaining state interest. The federal interest is what motivates the prisoner to file, and the lack of any remaining state interest may lead state officials not to contest, a motion to vacate a prior state conviction. Under those circumstances, it makes no sense not to have an effective federal statute of limitations.[7]

3. Under the correct interpretation of paragraph 6(4), the limitation period runs from the date on which the factual basis for the motion to vacate the state conviction could have been discovered with due diligence

If the vacatur of a state conviction is not the fact whose imputed discovery triggers the limitation period under paragraph 6(4), there remains the question of

[7] In light of that more immediate federal interest, it would be particularly anomalous to allow a defendant to take an unlimited amount of time before commencing a challenge to his *state* conviction, with no federal time limit. A *federal* conviction may also be used to support a recidivist sentence enhancement, and any collateral challenge to the validity of a prior federal conviction would have to meet the time limits set forth in the AEDPA. Thus, petitioner's view leads to the conclusion that, despite the government's paramount interest in achieving finality of a federal recidivist sentence and the AEDPA's regulation of the time period for challenging a prior federal conviction, there would be no federal time period within which a defendant would have to commence a challenge to a prior state conviction. There is no reason to read the AEDPA to give the defendant unilateral control, in that one instance alone, over when to undertake a legal challenge that could lead to upsetting the finality of the federal judgment.

when the limitation period does begin to run. In rejecting the claim that petitioner makes here —that "the operative date under [paragraph 6(4)] is * * * the date the state conviction was vacated"—the First Circuit in *Brackett* held that the operative date is "the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction." 270 F.3d at 68. That holding is correct. Unlike the order granting the motion to vacate the state conviction, the fact that forms the basis for the motion (in this case, an invalid waiver of the right to counsel) is both a fact that is "discovered" and one that, if pursued with "due diligence," will ordinarily lead to the prompt filing of a Section 2255 motion.

Petitioner does not dispute that the factual basis for the state-court claim is a "fact" susceptible of being "discovered," and he does not dispute that, in the context of Section 2255's limitation provision, the concept of "due diligence" makes more sense when applied to discovery of that fact than when applied to discovery of a court order. He does contend, however (Br. 21, 28-29), that, under this Court's decision in *Daniels*, the facts that form the basis for the state-court motion do not by themselves entitle a prisoner to relief under Section 2255, and that they therefore cannot be the facts that "support[] the claim" in the Section 2255 motion. For that reason, petitioner says, the facts that form the basis for the state-court motion are not the facts whose imputed discovery triggers the limitation period under paragraph 6(4).

Although a fact that forms the basis for challenging the state conviction is not a sufficient condition for challenging the federal sentence, it is a necessary condition, and in that sense it does support the claim. Indeed, because a state-court vacatur does not auto-

matically justify federal resentencing, the order alone is not the sole "fact" that supports the motion under Section 2255—it is necessary to consider the underlying factual basis for the state-court order. See pp. 23-24, *supra*. At a minimum, the view that the factual basis for the state-court motion is the "fact[] supporting the claim" (even if only in a necessary, but not sufficient, way) is more compatible with the statutory text than the view that the court order requested by the prisoner is a fact "discovered" by him or that the prisoner must exercise "due diligence" only in learning whether his state-court motion has been decided. And even if the two views are equally compatible with the text, petitioner's interpretation should be rejected because it is fundamentally at odds with the legislative purpose. Cf. *Duncan* v. *Walker*, 533 U.S. at 178 (considering "the competing constructions in light of [the] AEDPA's purposes" and adopting the construction that "respect[s] the interest in the finality of state court judgments" rather than the one that "hold[s] greater potential to hinder finality").[8]

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[8] If the Court agreed with petitioner that the factual basis for the state-court motion is not the "fact[] supporting the claim" in the Section 2255 motion, it would not necessarily follow that petitioner's interpretation of paragraph 6(4) is correct. One might conclude that paragraph 6(4) simply does not apply in cases of this type, and that such cases are always governed by paragraph 6(1) (unless paragraph 6(2) or 6(3) supplies a later triggering date). The court below rejected petitioner's contention that the limitation period under paragraph 6(4) runs from the date of the state court's decision, but it is not clear whether the court believed that the limitation period runs from the imputed discovery of the factual basis for the state-court motion or that paragraph 6(4) is inapplicable in cases of this type. There was no need for the court to decide that question, because, even if it believed that paragraph 6(4) applies, petitioner was aware of the factual basis for his state-court motion before his federal conviction became final, see J.A. 33, and the "latest" date under paragraph 6 of Section 2255 was thus the date on which the conviction became final.

4. The government's interpretation does not prevent a prisoner who acts diligently from challenging a federal sentence after a state conviction has been vacated

Petitioner contends that, unless his interpretation of paragraph 6(4) is adopted, it will be "virtually impossible" (Br. 32) for a prisoner in his position to comply with the statute of limitations, because of the delay between the filing of a motion to vacate the prior state conviction and the issuance of an order granting the motion. Petitioner argues (Br. 30-33) that it is unfair to penalize a prisoner for events that are beyond his control. He also argues (Br. 38; accord NACDL Br. 12-13) that the consequence of rejecting his interpretation is that district courts will be clogged with "placeholder" Section 2255 motions that are filed before the state-court motion is decided, to guard against the possibility that the motion will be decided after the limitation period has expired. These concerns are misplaced. If the Court agrees with the government's interpretation of paragraph 6(4), there is no reason to think that prisoners who exercise due diligence in taking the actions over which they have control—discovering the factual basis for the state-court motion, filing the state-court motion, and filing the federal-court motion—will be unable to file a Section 2255 motion within the one-year limitation period. There is likewise no reason to think that "placeholder" motions will be required.

a. The factual basis for a challenge to a state-court conviction is ordinarily known (or knowable) during the guilty plea or trial, at the time the asserted violation

occurs. As Judge Easterbrook has explained, the AEDPA's one-year limitation period "begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." *Owens* v. *Boyd*, 235 F.3d 356, 359 (7th Cir. 2001); accord *Hasan* v. *Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001). Cf. *United States* v. *Kubrick*, 444 U.S. 111 (1979) (same rule for Federal Tort Claims Act's statute of limitations). For that reason, a defendant whose claim (for example) is that his guilty plea was not knowing and voluntary because the trial court failed to advise him of a particular right, or that his attorney rendered ineffective assistance by pursuing a particular trial strategy, will usually know the factual basis for the claim immediately.[9] In most cases of that type, the facts that form the basis for the claim will thus be discoverable years before the federal conviction becomes final—indeed, years before federal charges are even brought. A deadline of a year from the date the federal conviction becomes final, therefore, will almost

[9] See, *e.g.*, *Brackett*, 270 F.3d at 71 (if the prisoner "received an inadequate colloquy" when he pleaded guilty, "he knew it then"); *Owens*, 235 F.3d at 359 ("the principal *fact* setting the stage for the current ineffective-assistance claim—that [the prisoner's] trial counsel attempted to present a [meritless] coercion defense—was known at trial"); *Candelaria* v. *United States*, 247 F. Supp. 2d 125, 130 (D.R.I. 2003) ("the 'facts' which matter * * * are those which existed at the time of the plea colloquy—namely, that [the prisoner] was not advised of the factual basis of the charges against him, that he was not informed of the state's burden of proof, that he was not told which constitutional rights he would forego by pleading guilty, and that he was not notified that he was facing deportation upon entering a guilty plea").

always provide ample time to seek and obtain an order vacating the state conviction.[10]

Even when the factual basis for a challenge to a state conviction is not discoverable at the time of the violation, it may still be discoverable at a sufficiently early date that the defendant will have an adequate opportunity to obtain the vacatur of the conviction within a year of the date his federal conviction becomes final. In *Custis* v. *United States*, 511 U.S. 485 (1994), for example, the factual basis for the state-court motion was known no later than the date of the federal sentencing. See *id.* at 488. In a case of that type, the prisoner will have at least the length of the federal direct-appeal process (which often lasts more than a year), plus an additional year, within which to obtain the vacatur of his state conviction.

b. In a case in which the factual basis for the challenge to the state conviction is discoverable only *after* the federal conviction becomes final, so that the limitation period is triggered by the imputed discovery, the prisoner may be able to obtain vacatur of the state conviction, and then file a Section 2255 motion, within a year of the date on which the basis for the claim could have been discovered, because state courts often take only a few months to decide a post-conviction motion. In *Brackett*, for example, the motion was filed in January 2000, see 270 F.3d at 63, and decided in June 2000, see *Gonzalez* v. *United States*, 135 F. Supp. 2d 112, 117 (D. Mass.), aff'd, 270 F.3d 60 (1st Cir. 2001), cert. de-

[10] See, *e.g.*, *Brackett*, 270 F.3d at 62-63 (factual bases for challenging two state convictions were known in 1991 and 1993; federal conviction became final in 1998); *Candelaria*, 247 F. Supp. 2d at 126-130 (factual basis for challenging state conviction was known in 1992; federal conviction became final in 2001).

nied, 535 U.S. 1003 (2002).[11] In such a case, the Section 2255 motion will be timely under paragraph 6(4).

c. In a case in which the state court's delay in deciding the motion prevents a prisoner from obtaining an order vacating his state conviction within a year of the date the federal conviction became final or the date the factual basis for the state claim was discoverable, the prisoner may be eligible for equitable tolling. As the court below explained, that doctrine may be available when a party's filing is untimely because of extraordinary circumstances "beyond his control." J.A. 34. Delay by the state court may satisfy that standard in a case of this type if the prisoner acted diligently in taking the actions that are within his control. This Court has not considered "the availability of equitable tolling" of the AEDPA's limitation period, *Duncan* v. *Walker*, 533 U.S. at 181, but two members of the Court have expressed the view that there is "[no]thing in the text or legislative history of [the] AEDPA" that precludes it, *id.* at 183 (Stevens, J., joined by Souter, J., concurring in part and concurring in the judgment). And every court of appeals to consider the question has concluded that the AEDPA's limitation period is subject to equitable tolling in an appropriate case. See, *e.g.*, *Neverson* v. *Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004) (citing cases).

Petitioner contends that the use of equitable tolling "implicitly assumes that Congress wrote a flawed statute," and that equitable tolling "is necessary to fix it." Br. 33. That contention is mistaken, both because the

[11] See also *United States* v. *LaValle*, 175 F.3d 1106, 1107 (9th Cir. 1999) (motion was filed in September 1996 and granted in January 1997); *Candelaria*, 247 F. Supp. 2d at 126-127 (motion was filed in June 2001 and granted in November 2001).

availability of equitable tolling does not suggest that the basic statute of limitations is flawed and because equitable tolling will rarely be necessary if the government's interpretation of paragraph 6(4) is adopted. Cases involving the vacatur of a prior conviction are a small subset of the cases covered by that provision (because the newly discovered evidence is usually the direct basis for the Section 2255 motion), and cases in which equitable tolling may be appropriate are a small subset of that subset (because the factual basis for the state-court claim is usually discoverable many years before the federal conviction becomes final).[12]

[12] As the court below observed (J.A. 31 n.5, 37), the result in *United States* v. *Gadsen*, 332 F.3d 224 (4th Cir. 2003), which endorsed the interpretation of paragraph 6(4) advanced by petitioner, might well have been the same if the Fourth Circuit had rejected that interpretation but applied equitable tolling. In *Gadsen*, the motion to vacate the state conviction was filed no more than ten months after the factual basis for the motion could have been discovered and more than 18 months *before* the prisoner's federal conviction became final; the state conviction was vacated nearly 18 months *after* the federal conviction became final; and the Section 2255 motion was filed within a year of the state court's decision. See *id.* at 225-226. Under those circumstances, it might have been appropriate to toll the period from the date the federal conviction became final (the triggering date for the limitation period) through the date the state courts acted.

B. Even If The "Fact[] Supporting The Claim" Whose Imputed Discovery Triggers The Limitation Period Under 28 U.S.C. 2255 Para. 6(4) Is The Order Vacating The State Conviction, The Date The Order "Could Have Been Discovered Through The Exercise Of Due Diligence" Is The Date The Order Could Have Been Obtained

1. Under petitioner's interpretation of paragraph 6(4), the relevant "fact[] supporting the claim" in a case of this type is the state court's order, and the triggering date for the one-year limitation period is the date the order "could have been discovered through the exercise of due diligence" *after the order in fact came into existence*. See Br. 24. (That will almost always be the date the order did come into existence.) But there is no reason why the limitation period should begin to run only after the relevant fact has come into existence. In a case in which the prisoner was able to control when the fact came into existence, it is possible that, if the prisoner had exercised due diligence, the fact could have come into existence, and thus have been discovered, at an earlier date. If petitioner is correct that the triggering fact is the court order vacating the state conviction, therefore, the limitation period should run, not from the date the court order was obtained, but from the date it *could have been* obtained if the prisoner had been diligent. For example, if a prisoner discovered the necessary facts a year later than he could have discovered them, and then waited an additional two years to file a motion to vacate the state conviction that could have been filed within a year of the discovery, the order granting the motion could have been obtained, and thus discovered, two years earlier if the prisoner had exercised due diligence.

This alternative interpretation is consistent with the text of paragraph 6(4), and it furthers the purpose of Section 2255's limitation provision by requiring prisoners to exercise diligence in obtaining the state-court order that is necessary before a Section 2255 motion can be filed. It also overcomes petitioner's two principal objections to the government's other interpretation: it does not presume that the "facts supporting the claim" in the Section 2255 motion are the facts that form the basis for the state-court motion; and it cannot be criticized on the ground that the limitation period may expire while the state-court motion is pending, because the period during which the motion is pending is excluded from the calculation.[13]

2. There are three possible objections to this alternative interpretation of paragraph 6(4). If the Court rejects the government's primary contention, none of these objections justifies rejecting the alternative suggested here.

The first possible objection is that the court order that could have been obtained if the state claim had

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[13] In this connection, it bears noting that the Section 2255 motion filed by the prisoner in *Gadsen* was likely timely under this interpretation as well. The state-court motion in that case was filed ten months after the prisoner's no-contest plea in state court; the conviction was vacated 36 months after the motion was filed (and nearly 18 months after the federal conviction became final); and the Section 2255 motion was filed 11 months after the conviction was vacated. See 332 F.3d at 225-226. If the Fourth Circuit had adopted the alternative interpretation of paragraph 6(4) proposed here, it might well have concluded that Gadsen acted diligently in filing his state-court motion; that the state-court order thus could not have been obtained any earlier than the date it was issued; and that the Section 2255 motion was therefore filed within a year of the date the order was discoverable in the exercise of due diligence.

been pursued diligently is not the "fact[] supporting the claim," because it would have been a different order than the one that *was* obtained. An earlier order, for example, would have had a different date and docket number, and might have used different language, than the later one. But if petitioner is correct that the "fact[] supporting the claim" in a case of this type is "the vacatur of [his] state conviction" (Br. 29), then the relevant fact whose imputed discovery triggers the limitation period is just that: a judicial declaration of invalidity. It is not the particular document in which the declaration happens to be made.

The second possible objection is that a prisoner who acted diligently in pursuing his state claim might not have succeeded in having the conviction vacated, because, for example, the records might not yet have been destroyed or the State might still have had an interest in defending the conviction. But as long as a legal basis for relief was available at the time the prisoner could have filed the motion in the exercise of due diligence, it should be presumed that he would have obtained the relief if he had requested it. A prisoner should not be heard to complain that he obtained relief at a later date for reasons unrelated to the merits of the claim, because, just as "[a] defendant has no entitlement to the luck of a lawless decisionmaker," *Lockhart* v. *Fretwell*, 506 U.S. 364, 370 (1993) (quoting *Nix* v. *Whiteside*, 475 U.S. 157, 175 (1986)), he has no entitlement to the luck of missing records or of a prosecutor uninterested in defending the conviction.

The third possible objection is that this interpretation will require federal courts to determine not only when the factual basis for the state claim could have been discovered, but also when the state-court motion could have been filed and when the motion would have

been decided if it had been filed earlier, and that the second and third determinations are too speculative. This objection is also without merit. As to the question of when the state-court motion could have been filed, prisoners can be given a full year from the date on which the factual basis for the motion could have been discovered through the exercise of due diligence, because paragraph 6(4) reflects a congressional judgment that, for the ordinary type of collateral attack on a conviction based on newly discovered evidence, it should always be possible to file the motion within a year of the date on which the evidence could have been discovered. As to the question of when the motion would have been decided, except perhaps in unusual cases, federal courts can presume that, if the motion had been filed earlier, the state court would have taken the same amount of time to decide the motion that it took when the motion was in fact filed.

C. Under Either Of The Permissible Interpretations Of 28 U.S.C. 2255 Para. 6(4), Petitioner's Section 2255 Motion Was Untimely

1. If the "facts supporting the claim" whose imputed discovery triggers the limitation period under paragraph 6(4) are the facts that form the basis for the motion to vacate the state conviction, petitioner's Section 2255 motion was untimely. In this case, the triggering date for the one-year limitation period under paragraph 6(1) was April 24, 1996, the AEDPA's effective date, because petitioner's judgment of conviction became final before that date. See note 2, *supra*. The triggering date under paragraph 6(4) was earlier, because petitioner was aware of the factual basis for his state claim at the time of his direct appeal (at the latest), which predated the AEDPA's effective date. See J.A. 7-8, 33.

Petitioner was therefore required to file his Section 2255 motion by April 24, 1997. He did not do so until February 13, 2001, nearly four years too late.

Nor could petitioner's motion be rendered timely by equitable tolling of the period during which his state-court motion was under consideration (February 6, 1998 through October 24, 2000). The one-year limitation period expired before the state-court motion was filed, and a motion that is "filed following the expiration of the limitations period cannot toll that period," because "there is no period remaining to be tolled." *Webster* v. *Moore*, 199 F.3d 1256, 1259 (11th Cir.) (per curiam), cert. denied, 531 U.S. 991 (2000). As a consequence, even if the 32 months during which the state motion was pending were subtracted from the 58 months between the date the limitation period commenced and the date the Section 2255 motion was filed, the difference would be 26 months, and petitioner's federal motion would still be 14 months late.

2. Petitioner's Section 2255 motion was also untimely if the "fact[] supporting the claim" whose imputed discovery triggers the limitation period is the state-court order vacating the conviction, because the order in this case could have been obtained (and thus discovered) in the exercise of due diligence more than a year before the Section 2255 motion was filed. Since the factual basis for petitioner's state-court claim was that he did not validly waive his right to counsel when he pleaded guilty, he likely was (or should have been) aware of the basis for the claim at the time of his plea. See, *e.g.*, *Brackett*, 270 F.3d at 71. Even giving him the benefit of the doubt, however, he certainly was aware of it by the time the court of appeals rejected the same claim in affirming his sentence in December 1995. See J.A. 7-8, 33. If petitioner had filed his state-court motion within a year of that date (*i.e.*, by December 1996), the motion could have been decided by August 1999 (assuming the state court took the same amount of time it took when the motion was actually filed). The triggering date under paragraph 6(4) was thus no later than August 1999, which was the applicable date because the AEDPA's effective date (the triggering date under paragraph 6(1)) was earlier. Under the alternative interpretation of paragraph 6(4), therefore, petitioner was required to file his Section 2255 motion by August 2000. He did not do so until February 2001, at least six months too late.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2004

(8)

No. 03-9685

In the Supreme Court of the United States

ROBERT JOHNSON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

SUMMARY OF ARGUMENT

The Government's complicated arguments boil down to proposing that the facts underlying a state vacatur used to enhance a federal sentence support a claim under § 2255 -- i.e., exactly the opposite of the Court's ruling in *Daniels v. United States*, 532 U.S. 374 (2001). Instead, the fact supporting the claim under § 2255 is the state court vacatur of a prior conviction. The Government no longer appears to dispute that a vacatur is a "fact," instead focusing on the terms "discover" and "due diligence" in § 2255(4). Petitioner's interpretation of § 2255(4) relies on the ordinary meaning of these terms read in context. In context, it is a straightforward exercise to ask and answer the following question: "What was the date on which the vacatur could have

been discovered through the exercise of due diligence?" Here, the date was the date the vacatur was issued.

Petitioner's interpretation of § 2255(4) serves the ends of finality in most cases by eliminating the need for costly and time-consuming federal placeholder petitions, which would have to be filed and then stayed under the Government's proposed rule. The vast majority of these placeholder petitions will be meritless because the States ultimately reject most habeas challenges. The net result of the Government's proposed rule will be to needlessly extend the road to finality in the vast majority of cases so as to shorten the road to finality in the small subset of cases in which a prior conviction is vacated.

Not only does Petitioner's interpretation promote finality, it serves the ends of comity, federalism, and fundamental fairness. The Court made an administrative decision in *Custis v. United States*, 511 U.S. 485 (1994), and *Daniels* to route challenges to prior state convictions back to the state courts -- a decision that both acknowledges the State's competence to adjudicate such challenges and affords appropriate deference to the State's decision-making process. Having routed such challenges to the States, comity and federalism are best served by respecting the State's resolution of those challenges.

The Government's concern that this scheme creates an incentive for delay is misplaced. The Government's concern rests on the premise that the State has little interest in preserving a conviction when the sentence has already been served. This premise is at odds with the conclusion in *Daniels* that States retain a strong interest in preserving their convictions even after the term of imprisonment has been served. Further, the concern over stale records expressed in *Custis*, *Daniels*, and *Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 403 (2001), is not present because the State's strong interest in preserving its convictions should cause it to preserve necessary documents for at least the duration of its statute of limitations.

Finally, the Government's new fallback position -- i.e., that the language in § 2255(4) should be changed to read that the limitations period is triggered by the date the vacatur could have been obtained -- is unworkable. It would require an unseemly inquiry into the state court's decision-making process to determine when the vacatur could have been obtained. Moreover, the Government's new fallback position apparently has two one-year periods of limitation (one for the State and another for the federal government), with a tolling period in between. This new scheme is well beyond the statutory language, and unnecessary in light of the clear language chosen by Congress.

In contrast, Petitioner's interpretation fits comfortably within the plain language of § 2255(4). *Daniels* held that the facts underlying the vacatur do not support a claim under § 2255. It is the vacatur that is the "fact" within the plain meaning of the phrase "facts supporting the claim." Accordingly, the triggering date of § 2255(4) in this type of case is the date the vacatur could have been discovered through the exercise of due diligence -- here, the date it was issued.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION CONFLICTS WITH *DANIELS* AND THE PLAIN LANGUAGE OF THE STATUTE

A. Under *Daniels*, the Underlying Facts Do Not Support A Claim Under § 2255

The Government concedes, as it must, what *Daniels* teaches: that facts showing a prior state conviction is unconstitutional (with rare exception) do not give rise to a claim under § 2255. *See* Brief For The United States ("Resp. Br.") at 3. Yet the crux of the Government's argument is that "[a]lthough a fact that forms the basis for challenging the State conviction is not a sufficient condition for challenging the federal sentence, it is a necessary condition, and therefore it does support the claim." Resp. Br. at 25.

Through these verbal gymnastics, the Government urges the Court to adopt a rule that squarely contradicts *Daniels*. Under the Government's proposed rule, the "facts supporting the claim" under § 2255(4) are the same facts that *Daniels* held do not support a claim under § 2255.

The Government essentially concedes that the state court vacatur is a "fact" supporting the claim, but contends that "the order alone is not the **sole** 'fact' that supports the motion under Section 2255 ." Resp. Br. at 26 (emphasis added). This argument seeks to add language that does not exist in the statute -- i.e., the statute says "facts supporting the claim" not "the sole fact supporting the claim." It does not matter if the vacatur is the "sole" fact that supports the claim, it is the operative fact, without which there is no claim. Section 2255(4) only makes sense if the statute is triggered by the date

on which the last necessary fact could have been discovered.

Of course, there are other facts that may be pleaded along with the vacatur to make out a claim under § 2255, but they do not trigger the limitations period under § 2255(4) because, until the vacatur issues, the facts supporting the claim do not exist. Use of the plural "facts" (as opposed to the singular "fact") in § 2255(4) means that the statute is triggered on the date when all necessary facts supporting the claim could have been discovered through the exercise of due diligence. The Government's argument makes little sense because it triggers the limitation period by some earlier fact and not the presence of all facts necessary to support a claim under § 2255.

In advancing its new position, the Government apparently abandons two of the principal bases for the Eleventh Circuit's decision below. First, the Government does not attempt to classify vacaturs as solely "legal propositions," as opposed to facts. *See* Brief For Petitioner ("Pet. Br.") at 23-24. Clearly, a vacatur is an historical fact, just as is a conviction. Pet. Br. at 18-24. Second, the Government does not contend, as did the Eleventh Circuit, that the cases interpreting § 2244 show that a vacatur cannot be a "fact." These § 2244 cases are perfectly consistent with the rule advocated by Petitioner. *See* Pet. Br. at 25-28.

In sum, the Government's position is that the "facts supporting the claim" under § 2255(4) are the facts underlying the State vacatur -- in direct contradiction with *Daniels*. The more reasonable interpretation, which is consistent with *Custis* and *Daniels*, is that the State vacatur is the fact supporting the claim under § 2255(4).

B. Petitioner's Interpretation Is Consistent With The Plain Meaning Of The Terms "Discover" And "Due Diligence"

1. "Discover"

The Government argues that "even if petitioner is correct that the vacatur is a fact supporting his claim, it does not follow that the vacatur of the conviction is the event from which the limitation period runs under paragraph 6(4)." Resp. Br. at 16. According to the Government, it is not the fact that triggers the claim under § 2255(4), but the "discovery" of the fact. *Id.* The Government urges that a vacatur cannot be "discovered" because it was not pre-existing, and what is "discovered" is the factual basis underlying the State vacatur.

To reach this conclusion, which contradicts *Daniels*, the Government plucks the word "discover" from the context of the statute, then interprets it in isolation from the other statutory language. This interpretation is incorrect for several reasons.

First, the language chosen by Congress makes sense when read in context. It is perfectly reasonable and understandable to ask and answer the question: "What was the date on which the vacatur could have been discovered through the exercise of due diligence?" It could have been discovered, at the earliest, when it was issued (or becomes final). It is possible, however, in rare cases that the vacatur could not have been discovered until later. *See, e.g.*, *Knight v. Schofield*, 292 F.3d 709, 710 (11th Cir. 2002) (state court order not sent to prisoner by the state supreme court).

Second, the phrase chosen by Congress -- "the date on which the facts supporting the claim could have been discovered" -- is broad and was not meant to cover only vacaturs, but a variety of facts that can support a claim under § 2255. As recognized by the Fourth Circuit: "The use of a general categorical term ('facts') to refer to the spectrum of specific examples of that category (the universe of potential factual predicates for a § 2255 challenge) is an ordinary technique in the drafting of statutes." *United States v. Gadsen*, 332 F.3d 224, 227 n.2 (4th Cir. 2003). As the Government concedes, cases involving a vacatur of a prior conviction are but a small subset of the many types of cases covered by § 2255(4).

Third, the definition of "discover" does not require that the fact previously existed. Instead, the term "discover" also includes making "known . . . something . . . unknown." *Webster's Third New International Dictionary* 647. A vacatur cannot be known until it is issued.

The Government's argument that the other triggers involving legal judgments (*see* § 2255(1) & (3)) do not use the word "discover[]" is a red herring. Congress chose broad language in § 2255(4) to cover a variety of circumstances -- from facts showing *Brady*[1] violations to state court vacaturs and many other facts. In § 2255(1) and (3), a much more specific event was addressed. It is understandable that § 2255(4) is treated differently from than § 2255(1) and (3) because Congress used different language in § 2255(4). This choice of different language makes perfect sense because vacaturs are historical facts.

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

2. "Due Diligence"

The Government asserts that Petitioner's interpretation "deprives the requirement of 'due diligence' of virtually all its force." Resp. Br. at 19-20. To the contrary, the Government reads the phrase "due diligence" for more than it is worth. Again, the statute uses broad language, meant to cover a variety of circumstances. *See Gadsen*, 332 F.3d at 227 n.2. The statute simply uses "due diligence" to fix the date triggering the limitations period. Again, it makes perfect sense to ask and answer the question: "What was the date on which the vacatur could have been discovered through the exercise of due diligence?" Here, the Petitioner was charged with discovery on the date the vacatur issued, because it was mailed to him as a party and he received it. This will be the normal course, unless the petitioner can show that the order could not be discovered through the exercise of due diligence.[2]

In sum, the Government presses a distorted reading of the terms "discover" and "due diligence" that is unnecessary in the context of § 2255(4) to support its conclusion that "facts supporting the claim" should be read contrary to *Daniels*.

[2] Contrary to the Government's statement (Resp. Br. at 17, 25), Petitioner does contend that his interpretation of § 2255(4) is consistent with the plain meaning of "discover" and "due diligence," and that these terms make just as much sense applied to a vacatur as to other facts.

II. PETITIONER'S INTERPRETATION SERVES THE ENDS OF FINALITY, AS WELL AS COMITY, FEDERALISM, AND FAIRNESS

A. Finality Is Better Served Through Petitioner's Rule

Petitioner's interpretation of § 2255(4) furthers the policy of finality in most cases. The Government's interpretation will certainly promote finality in this particular case because it cuts off the opportunity for challenging an illegal federal sentence through § 2255. But it will also needlessly extend the vast majority of cases, in which the conviction and sentence already would have become final but for the Government's proposed rule.

Under the Government's proposed rule, defendants will be encouraged to file a "placeholder" § 2255 motion prior to the expiration of one year after direct review. Experience teaches that it usually takes longer to complete state court habeas proceedings (including appeals), than it does for direct review of a criminal sentence plus the one year period under § 2255(1). *See United States v. Venson*, 295 F. Supp. 2d 630, 634 (E.D. Va. 2003) ("[A] meritorious challenge to a predicate state court conviction may take well in excess of one year to reach a final state resolution.").[3] When a state habeas

[3] Petitioner disagrees with the Government's statement that "state courts often take only a few months to decide a post-conviction motion." Resp. Br. at 29. For example, in this case, the state court took nearly three years to resolve Petitioner's motion to vacate. In *Gadsen*, it was over three years after the motion for vacatur was filed that his conviction was conclusively vacated. And perhaps the most extreme example is found in this Court's *Lackawanna County* decision, in which the motion for state postconviction relief remained pending for 14 years without a ruling. *See* 532 U.S. at 397-98. The need for placeholder petitions

petition challenging a prior conviction is still pending or yet to be filed at the end of one year limitations period in § 2255(1), the prudent petitioner will file a placeholder petition and ask the district court to stay the proceedings as state habeas is completed. The Government's proposed rule will, therefore, have the deleterious effect of encouraging a flood of placeholder petitions in federal court so as to preserve petitioners' rights. This will needlessly increase the time to finality of perhaps thousands of convictions and sentences when they otherwise would not be subject to challenge (because the state courts reject the vast majority of habeas challenges). *See Brackett v. United States*, 206 F. Supp. 2d 183, 186 n.3 (D. Mass. 2002) (because the Government's approach forces the federal motion to be filed before the state challenges are resolved, it **"results in thousands of meritless petitions being filed** -- each of which requires a case be opened, orders issued, papers docketed, and the file stored") (emphasis added).

As the Government acknowledges, there are relatively few cases in which a prior conviction is vacated. *See* Resp. Br. at 31 ("Cases involving the vacatur of a prior conviction are a small subset of the cases covered by [§ 2255(4)] . . . ."). Accordingly, the Government's proposed rule would result in shortening the road to finality for a few cases, but extending it in thousands of cases for no good reason.

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under the Government's proposed rule is illustrated by *Venson*, 295 F. Supp. 2d 630 (placeholder petition filed), and *United States v. Hoskie*, 144 F. Supp. 2d 108 (D. Conn. 2001) (attempts to delay resolution of federal case in light of state habeas).

B. The "Incentive For Delay" Argument Does Not Make Sense

The Government argues that Petitioner's reading of § 2255(4) increases incentives for delay because the State has little interest in preserving a prior state conviction, especially where the accompanying sentence has already been served. Resp. Br. at 4, 12, 21-22, 24 (State may be "unwilling" or "uninterested" in defending collateral attacks to prior convictions). The suggestion here is that States cannot be trusted to handle challenges to prior convictions adequately -- a concept wholly at odds with the *Custis* and *Daniels* framework directing such challenges to the States.

This Court in *Daniels* squarely rejected "the State has no interest in stale convictions" logic. There, petitioner argued that the State of California would not be prejudiced by his federal challenge to two prior state convictions, because they were more than two decades old and the sentences had been served. 532 U.S. at 379. This Court disagreed:

> Even after a defendant has served the full measure of his sentence, **a State retains a strong interest in preserving convictions it has obtained**. States impose a wide range of disabilities on those who have been convicted of crimes, even after their release . . . [such as being] barred from possessing firearms . . . . Further, each of the 50 states has a statute authorizing enhanced sentences for recidivist offenders . . . . **Thus, the State does have a real and continuing interest in the integrity of its judgments**.

Id. at 379-80 (emphasis added).

Additionally, given the State's continuing interest in the integrity of its judgments, the Government's reliance on the specter of stale or absent records (Resp. Br. at 12, 21-22) is unavailing. If States have a strong and continuing interest in preserving prior convictions, then they also have a strong and continuing interest in preserving the documents necessary to protect those prior convictions, consistent with their statute of limitations for collateral challenges. The records problem in *Custis*, *Daniels*, and *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 403 (2001), was different. In those cases, the issue was potentially allowing a collateral attack in federal court beyond the state statute of limitations. The risk of absent records was more palpable because the State would have little reason to preserve its records relating to a prior conviction beyond the State's statute of limitation for challenges to that conviction.

C. State Limitation Periods Limit The Ability To Challenge Prior Convictions

The Government argues that Petitioner's interpretation "effectively eliminates any meaningful statute of limitations for motions of this type." Resp. Br. at 21. This argument ignores the fact that the great majority of states have limitations periods on collateral challenges.[4] Indeed, the trend

[4] *See* Ala. R. Crim. P. 32.2 (providing that where a habeas petition does not raise constitutional grounds or involve an appeal that was untimely through no fault of the petitioner, the petition must be filed within one year); Alaska Stat. § 12.72.020 (one or two years, depending upon the petitioner's grounds); Ariz. Rev. Stat. Ann. § 13-4231 (90 days); Ark. R. Civ. P. 37.2 (60 or 90 days); *In re Sanders*, 21 Cal. 4th 697, 704 (1999) (petitions not entitled to a presumption of timeliness if filed more than 90 days after due date for appellant's final reply brief in a direct appeal); Colo. Rev. Stat. § 16-5-402 (three years for many felonies); Del. Super. Ct. Crim. R. 61 (three years); O.C.G.A. § 9-14-12 (four years); Idaho Code § 19-2719 (for non-capital cases, one year; for capital cases, 42 days after judgment imposing death sentence); 725 Ill. Comp. Stat. 5/122-1(c) (six months after conclusion of direct appeal; three years from conviction if no direct appeal); Iowa Code § 822.3 (three years); Kan. Stat. Ann. § 60-1507(f)(2) (one year); Ky. R. Crim. P. 11.42(10) (three years); La. Code Crim. Proc. Ann. art. 930.8(A) (two years); Me. Rev. Stat. Ann. tit. 15, § 2128(5) (one year); Md. Code Ann. Crim. Proc. § 7-103(b) (ten years in non-capital cases; 210 days in capital cases); Miss. Code Ann. § 99-39-5(2) (one year for capital cases; three years for non-capital cases); Mo. Ann. Stat. § 547.360(2) and Mo. Sup. Ct. R. 24.035(b), 29.15(b) (90 or 180 days, depending upon the circumstances); Mont. Code Ann. § 46-21-102 (one year); Nev. Rev. Stat. Ann. § 34.726 (one year); N.C. Gen. Stat. § 15A-1415(a) (120 days in capital cases); Ohio Rev. Code Ann. § 2953.21 (180 days); Okla. Stat. tit. 22, § 1089(D) (90 days for capital cases); Or. Rev. Stat. § 138.510(3) (two years); 42 Pa. Cons. Stat. § 9545(b) (60 days or one year, depending upon the circumstances); S.C. Code Ann. § 17-27-45 (one year); S.D. Codified Laws § 23A-31-1 (120 days in capital cases); Tenn. Code Ann. § 40-30-102(a) (one year); Tex. Crim. Proc. Art. 11.071(4) (180 days in capital cases); Utah Code Ann. § 78-35a-107(1) (one year); Va. Code Ann. § 8.01-654(A)(2) (one or two years); Wash. Rev. Code § 10.73.090 (one year); Wis. Stat. Ann. § 809.30(2)(b) (notice of intent to pursue post-conviction or post-disposition relief due within 20 days); Wyo. Stat. Ann. § 7-14-103(d) (five years).

since the enactment of the AEDPA is toward relatively modest limitation periods for collateral challenges.[5]

[5] *See* Ala. R. Crim. P. R. 32.2 (amended in 2002 to shorten the time in which to file a state habeas petition from two years to one year); O.C.G.A. § 9-14-12 (in 2004, imposing a new four-year limitations period for collateral attacks on felony convictions); Kan. Stat. Ann. § 60-1507(f) (in 2003, amending the post-conviction relief statute from allowing petitions to be filed "at any time" to

Finally, any inroads on finality are a necessary part of the administrative decision in *Custis* and *Daniels* about how to handle challenges to prior state convictions. The road to finality for federal recidivist sentences based on state prior convictions could have been much shorter -- i.e., challenges to prior convictions could have been handled at federal sentencing. But this Court made the prudential decision to send these challenges back to the state courts, due in part to concern over allowing challenges that the States themselves would not permit (because they were untimely under a state limitations period or otherwise barred). The Court concluded such challenges would be contrary to finality, comity, and federalism because they would deprive state court judgments of their normal force and effect. Such direct challenges would also risk absent records because the federal sentencing court may not be able to retrieve state records of a conviction that is beyond state collateral challenge. Any resulting delay to finality is a function of the framework established by *Custis* and *Daniels* routing such challenges to the States.[6]

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requiring such petitions to be filed within one year); La. Code Crim. Proc. Ann. art. 930.8(A) (shortened in 1999 to reduce the limitations period from three years to two years); Me. Rev. Stat. Ann. tit. 15, § 2128(5) (adding an express one-year limitations period in 1997); Miss. Code Ann. § 99-39-5(2) (amended in 2000 to shorten the limitations period for capital cases from three years to one year); Mont. Code Ann. § 46-21-102 (amended in 1997 to change the period from five years to one year).

[6] For all of the Government's concern over stale or absent records, its proposed rule does not address the issue of a challenge to an old state prior conviction that is only instituted after a federal recidivist sentence has been imposed. For example, a defendant could challenge a fifteen-year-old drug conviction the day after his federal sentence is imposed, and the relevant state records would be no more available under the Government's proposed rule.

D. Comity, Federalism, and Fairness Are Better Served By Petitioner's Rule

The Government takes issue with Petitioner's statement that the Eleventh Circuit's rule strips the state court of its ability to exculpate criminal defendants. Petitioner's point is that this Court in *Custis* and *Daniels* made the administrative decision to send challenges to prior convictions back to the state courts. This decision was motivated by, *inter alia*, the Court's concern that challenges should not be permitted where the States would not allow them because this would threaten to "deprive [a] state court judgment of its normal force and effect." *Daniels*, 532 U.S. at 378. Having so routed the challenges to the States -- a decision that both acknowledges the States' competence to adjudicate such challenges and implies a certain deference to the States' decision-making processes as to the validity of prior convictions -- it would deprive the vacatur of the force and effect acknowledged in *Custis* and *Daniels* to disregard it once issued. While the federal government has an interest in preserving the federal sentence (thus explaining why it is permissible to have a one-year limitations period in the first place), the State is put in control of adjudicating the validity of the prior state conviction under *Custis* and *Daniels*.

Finally, it is important to remember the interests in "fundamental fairness" served by the Great Writ. *See Engle v. Isaac*, 456 U.S. 107, 126 (1982) (recognizing the writ of habeas corpus serves as "a bulwark against convictions that violate fundamental fairness") (citations and internal quotation marks omitted). It offends fundamental fairness to add years to a sentence based on a prior conviction that was obtained in violation of the Constitution. In a very real sense, Petitioner is incarcerated today based on a conviction that violated the Constitution. This Court in *United States v. Tucker* called a

sentence based on a later-vacated prior conviction "misinformation of a constitutional magnitude." 404 U.S. 443, 446 (1972). Similarly, in *Johnson v. Mississippi*, this Court said "it would be perverse" to use an invalid prior conviction as an aggravating circumstance in a capital case. 486 U.S. 578, 586 (1988).

III. RELIANCE ON EQUITABLE ESTOPPEL IS MISPLACED

The Government, like the Eleventh Circuit, seeks a firm rule: the facts supporting the claim under § 2255(4) are the facts underlying the vacatur. However, the Government seems to recognize that there is a problem with this rigid interpretation because a petitioner could initiate his state challenge prior to federal sentencing or immediately thereafter and still not satisfy the bright-line one-year limitations period, due to no fault of his own. *See*, *e.g.*, *Gadsen*, 332 F.3d at 228 (state court took more than three years to adjudicate state claim).

Such a rigid application is inconsistent with the notion that improperly enhanced sentences may be reopened under § 2255 and is inconsistent with the framework established by *Custis* and *Daniels* routing petitioners back to state courts.

To solve the problem of an overly rigid rule, the Government (like the Eleventh Circuit) relies on a case-by-case application of equitable tolling. But this version of equitable tolling provides insufficient guidance to most movants under § 2255. The Government is not willing to say precisely how it will apply, only that it "may" apply in certain cases. How meaningful any such mechanism will be is dubious, especially given that the Government does not even concede that the Petitioner in *Gadsen* -- who filed his state

collateral challenge before his federal conviction became final -- was entitled to equitable tolling. *See* Resp. Br. at 31 n.12 (Gadsen "might well" or "might have" been eligible for equitable tolling).

Given this uncertainty, prudent petitioners will not rely on equitable tolling and will instead file placeholder petitions. As discussed *supra*, this is an undesirable result and as a practical matter will place an unnecessary burden on the federal district courts. In any event, there is no need for this soft and complex equitable tolling rule when the plain language of the statute allows treating a vacatur as a "fact." Such a reading eliminates the need to assume that Congress wrote a flawed statute and that equitable tolling is necessary to fix it.

There is no need to fix what is not broken: it is well within the plain meaning of § 2255(4) to interpret "facts" to include vacaturs. And the practical consequences of Petitioner's rule are much more favorable. Such a rule, consistent with the ease of administration rationale stressed by this Court in *Custis* and *Daniels*, would only permit § 2255 challenges to be filed *after* the state court has conclusively invalidated the prior conviction. There would be no need for meritless placeholder petitions, thereby eliminating the needless expenditure of resources that inevitably accompanies them. The high rate of failure in the State system will screen out the vast majority of petitions.[7]

[7] In the end, the Government contends that if both parties have presented views of § 2255(4) that are equally compatible with the text, then the Government's view should be adopted because it serves the legislative purpose -- i.e., any "tie" should go to the Government. Resp. Br. at 26. As shown *supra*, the Government's premises are incorrect. Petitioner's rule is more compatible with the plain language of the statute and better serves finality, comity, federalism, and fairness. If, however, there is a "tie," any

IV. THE GOVERNMENT'S NEW FALLBACK POSITION IS UNWORKABLE AND CONTRARY TO THE PLAIN MEANING OF THE STATUTE

For the first time, the Government argues a new fallback position: even if the vacatur is a fact supporting the claim, the trigger should be the date the vacatur could have been obtained. Resp. Br. at 32-33. This approach is impractical because it creates a need for evidentiary findings that are unworkable and unseemly, and because it is grounded in speculation. It also engrafts a new statutory scheme on top of § 2255(4)'s plain language.

The Government's fallback position would require, at a minimum, a factual inquiry into when the vacatur could have been obtained if it had been filed earlier. The Government would have the district court impose a presumption that the state court would have taken the same amount of time to decide the motion if it were filed at an earlier date. This presumption, no doubt, would be rebuttable, like most presumptions. One can only imagine what the proceedings could entail -- the deposition of the state court judge to see if the motion would have been decided on the same timeline; a deposition of the state court administrators to see if the same judge would have been assigned the motion if it had been filed earlier; or perhaps a deposition of the State attorneys to see what its position would have been on the motion, especially if

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ambiguity should be interpreted in Petitioner's favor because the statute of limitations in § 2255 is in derogation of the common law. *See Badaracco v. Comm'r of Internal Revenue*, 454 U.S. 386, 403 n.3 (1984) (recognizing that statutes in derogation of common law are strictly construed); *see also* Resp. Br. at 4 (acknowledging that "no statute of limitations governed motions for collateral relief under" § 2255 before AEDPA).

different attorneys would have been assigned. Such a rule would involve too many "what ifs" and would be extremely unworkable as an exercise in speculation, and a burdensome and intrusive one at that.

Further, it appears that the Government's fallback plan engrafts a new statutory framework on the existing language of § 2255(4). The proposed fallback rule seems to operate as follows. The petitioner has one year to file his state habeas claim -- and this one year period is triggered by the facts on which the state habeas claim is based. Resp. Br. at 33 n.13, 35 ("[P]risoners can be given a full year from the date on which the factual basis for the motion could have been discovered through the exercise of due diligence . . . ."). Then, the court is to toll the period during which the state habeas case is pending. Resp. Br. at 33 ("[T]he period during which the motion is pending is excluded from the calculation."). Then, if the state court vacates the prior state conviction, the federal prisoner would have another year in which to bring his § 2255 motion. *See* Resp. Br. at 33 n.13. In all, it appears that the Government would have two one-year periods of limitation (one for the State and another for the federal government), with a tolling period in between. Needless to say, this scheme is not within the plain language of § 2255(4). If such a statute would be good policy, it is for Congress to pass.

The statute Congress chose to enact speaks in terms of the date on which the facts supporting the claim could have been discovered. The critical fact is the vacatur, and it could not have been discovered until it was issued. The Government seeks to change the language of the statute to say "when the vacatur could have been obtained" but that is simply not what the statute says.

CONCLUSION

Accordingly, for the foregoing reasons, Petitioner respectfully requests that the Court reverse the Eleventh Circuit's Opinion, hold that Johnson has complied with the statute of limitations in § 2255(4), and remand the case for consideration of the merits of Johnson's § 2255 motion to vacate.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 1 2 2004
OFFICE OF THE CLERK

NO. 03-9685

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT JOHNSON, Jr.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

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AMICUS CURIAE BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE GEORGIA ASSOCIATION OF CRIMINAL DEFENSE LAYWERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

WHEN A STATE COURT VACATES AS UNCONSTITUIONAL A PRIOR STATE CONVICTION THAT HAD BEEN USED TO ENHANCE A FEDERAL SENTENCE, IS THE VACATUR OF THAT CONVICTION A "FACT SUPPORTING THE CLAIM" STARTING THE ONE-YEAR STATUTE OF LIMITATIONS UNDER 28 U.S.C. § 2255(4)?

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INTEREST OF THE AMICUS CURIAE[1]

This amicus brief is written by the Georgia Association of Criminal Defense Lawyers (hereinafter GACDL) which is a non-profit corporation organized in 1974 and by the National Association of Criminal Defense Lawyers (hereinafter NACDL) which is a District of Columbia non-profit corporation.

GACDL has a membership that is comprised of more than fifteen hundred (1,500) attorneys licensed to practice law in the State of Georgia. GACDL is the only Georgia association of public and private defense lawyers. The association is dedicated to the preservation and improvement of our adversary system of justice, and a reasoned and informed advancement of criminal procedure and jurisprudence. The affiliates and leadership of the association believe GACDL represents the concerns and interest of those lawyers who undertake the responsibility of defending citizens accused of crimes in the State of Georgia.

Article II of the by-laws of the GACDL defines the purposes of the association. Subsection (a) expresses the association's commitment to the defense of fundamental civil liberties assured by the state and federal Constitutions, in addition to the association's concern with the fair and impartial administration of criminal justice. It confirms the association is devoted "[t]o protect and insure by rule of law, those individual rights guaranteed by the Georgia and Federal Constitutions in criminal cases; to resist the efforts which are constantly being made to curtail such rights; to

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[1] The Parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk of this Court. This brief was not written in whole or in part by counsel for a party. Amici and their counsel were not compensated in any way.

encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice in the common good."

The amicus curiae committee of GACDL is a standing committee which submits amicus briefs in state and federal appellate courts on issues deemed to be of significance to defense lawyers throughout the State of Georgia. The amicus curiae committee requested and authorized the undersigned to file this brief.

The NACDL was founded over 40 years ago and now has a membership including more than 10,000 attorneys with members in every state. NACDL has some 80 state and local affiliates which permit it to speak on behalf of over 30,000 professional defenders. The American Bar Association recognizes NACDL as an affiliate and accords it representation in its House of Delegates. NACDL is widely recognized as the voice of the criminal defense bar. NACDL was founded to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties, as guaranteed by the original Constitution and the Bill of Rights. One of its particular concerns is the availability of effective judicial remedies, including appellate review, for those our system has failed, and for whom collateral review thus provides the only avenue for seeking justice.

The NACDL national amicus curiae committee requested and authorized the undersigned to file this brief.

SUMMARY OF THE ARGUMENT

Petitioner filed a Petition for Writ of Certiorari, challenging the lower court's determination that his 28 U.S.C. § 2255 motion was time-barred. Specifically, Petitioner was convicted of a federal drug conspiracy offense, and his sentence, which was imposed in 1994, was enhanced based on prior state convictions. Subsequently, Petitioner successfully challenged his prior state convictions and then filed A Section 2255 motion to have his enhanced sentence corrected to reflect the vacatur. The vacatur of the state court convictions occurred on October 24, 2000.

The government argued that the vacatur[2] was not a "fact" within the meaning of 28 U.S.C. § 2255 ¶6(4); thus, Petitioner was time-barred by the one year statute of limitations. On August 5, 2003, in a divided panel decision, the Eleventh Circuit affirmed the denial of Petitioner Johnson's Section 2255 action as being untimely, reasoning that it was not brought within one year "of the date on which the facts supporting the claim or claims presented could have been discovered . . ." *Johnson v. United States*, 340 F.3d 1219, 1226 (11th Cir. 2003) (citation omitted).

The two other Circuits to have addressed this issue are hopelessly split. In *United States v. Gadsen*, 332 F.3d 224 (4th Cir. 2003), the Fourth Circuit held that the setting aside of a prior conviction is a "fact" within the meaning of 28 U.S.C. § 2255 ¶6(4). In *Brackett v. United States*, 270 F.3d 60 (1st Cir. 2001), however, the First Circuit held that the setting aside of a prior conviction is not a "fact" within the meaning of 28 U.S.C. § 2255 ¶6(4).

Amici submits that the language and spirit of the limitations statute dictate a result in accordance with *Gadsen*, *supra*. In pertinent part, 28 U.S.C. § 2255 ¶6 prescribes that

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[2] Vacatur, meaning the setting aside of the prior conviction.

the one year limitations period begins from the latest of, "(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." It is the "fact" of the vacatur which gives a federal inmate the legal legs to challenge the enhanced federal sentence. This construction is also consistent with existing Supreme Court precedent; provides defendants with the remedy which the Supreme Court has promised; honors the most basic tenets of fairness; and prevents the filing of premature and meritless Section 2255 motions.

ARGUMENT

A. WHEN A STATE COURT CONVICTION IS USED TO ENHANCE A FEDERAL SENTENCE, THE ONE YEAR STATUTE OF LIMITATIONS OF 28 U.S.C. §2255 SHOULD BE INTERPRETED TO COMMENCE WHEN THE STATE COURT CONVICTION IS CONCLUSIVELY INVALIDATED.

In *Johnson v. United States*, 340 F.3d 1219 (11th Cir. 2003), the Eleventh Circuit affirmed the lower court's determination that Petitioner Johnson's Section 2255 action was time-barred. Amicus Curiae respectfully requests that the Court reverse the judgment of the Eleventh Circuit and to rule in favor of Petitioner for the following reasons:

(1) Such a ruling is consistent with precedent of the United States Supreme Court and the language of 28 U.S.C. §2255 ¶6(4);

(2) Such a ruling would provide those defendants, who reasonably relied on Supreme Court precedent, with the promised remedy;

(3) Such a ruling furthers the ends of justice by preventing defendants from serving substantially increased sentences based upon invalid state convictions; and

(4) Such a ruling would prevent the premature filing of meritless 2255 motions.

B. UNITED STATES SUPREME COURT PRECEDENT HAS INVITED DEFENDANTS TO CHALLENGE THEIR ENHANCED FEDERAL SENTENCES BY MAKING A SUCCESSFUL CHALLENGE TO THE PRIOR STATE CONVICTION IN A COLLATERAL PROCEEDING AND THEN BY FILING A §2255 MOTION TO CORRECT THE ENHANCED SENTENCE.

In *Custis v. United States*, 511 U.S. 485, 497, 114 S. Ct. 1732, 128 L.Ed..2d 517 (1994), the Court held that federal defendants could not attack the validity of prior convictions used to enhance their federal sentences at the federal sentencing proceeding. The Court in *Custis* directed defendants to attack their prior convictions in separate proceedings and, if successful, to "then apply for reopening of any federal sentence enhanced by the state sentences." *Id.* at 497.

Recently and since the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the Court in *Daniels v. United States*, 532 U.S. 374, 121 S. Ct. 1578, 149 L.Ed.2d 590 (2001), held that a federal prisoner may not challenge a federal sentence through a Section 2255 action on the ground that a prior state conviction was unconstitutionally obtained. Instead, the Court reasoned that the defendant should "pursue any

channels of direct or collateral review still available to challenge his prior conviction" and "[i]f any such challenge to the underlying conviction is successful, the defendant may then apply for reopening of his federal sentence." *Id.* at 382.

The collective instruction of *Custis* and *Daniels* is that federal defendants may not challenge in the federal sentencing proceeding the validity of their prior state convictions used to enhance their federal sentences; after sentencing, they may challenge the validity of their prior state conviction in a collateral proceeding; and if successful, they may initiate a Section 2255 action to correct their enhanced federal sentence. Notably, *Custis* and *Daniels* did not place any time constraints upon this procedure. Accordingly, the only reasonable reading of *Custis* and *Daniels* is that a federal prisoner, who avails himself of the Court's invitation to challenge a prior state conviction, is not thereafter barred merely because the challenge was not completed within one year of the federal sentencing.

C. THE DECISIONS IN *JOHNSON* AND *BRACKETT* PUNISH DEFENDANTS WHO HAVE REASONABLY RELIED ON THE PROCEDURE OUTLINED IN *CUSTIS* AND *DANIELS*.

As discussed above, Supreme Court precedent holds that federal defendants may not challenge their prior state conviction being used to enhance their sentence, at their federal sentencing. Instead, the Court instructs defendants to make these challenges in separate proceedings after sentencing and, if successful, to file a Section 2255 motion to vacate, set aside, or correct sentence. To date, the Court has not imposed a time constraint on this procedure.

Under 28 U.S.C. §2255, a prisoner in custody under sentence of a federal court may petition the court that

imposed the sentence to vacate, set aside or correct the sentence subject to a one-year period of limitations, which runs from the latest of:

> (1) The date on which the judgment of conviction becomes final;
>
> (2) The date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) The date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(4) The date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.**

28 U.S.C. §2255 ¶6 (emphasis added).

The only construction of 28 U.S.C. §2255 ¶6(4) that is consistent with the Supreme Court precedent of *Custis* and *Daniels* is the interpretation outlined by the United States Court of Appeals for the Fourth Circuit in *United States v. Gadsen*, 332 F.3d 224 (2003). In *Gadsen*, the Fourth Circuit held that:

> The plain text of §2255 and the logic of the Supreme Court's opinion in Daniels point to the same conclusion: in cases like

> Gadsen's, the federal statute of limitations begins running when the state court conviction is conclusively invalidated.

Id. at 228-229.

To hold that the one year statute of limitations begins before the state conviction is conclusively invalidated would contravene the Supreme Court's rulings in *Custis* and *Daniels*. Although a defendant has control over when to initiate the challenge in state court, the defendant has no control over the court's subsequent actions in resolving the matter. The state court could take over one year to invalidate the defendant's prior state conviction and any appeal of that ruling would almost certainly exceed the one year period.

The Fourth Circuit in *Gadsen*, *supra* correctly allocated control over the one year limitations period to the defendant by holding that the one year period commences when the state court conviction is conclusively invalidated. Any other result would subjugate defendants' rights as outlined in *Custis* and *Daniels* to the vagaries of a time-line entirely beyond their control.

The court in *United States v. Cavallaro*, 2000 WL 230225 (D. Me. 2000), provided a logical framework to explain 28 U.S.C. §2255 ¶6(4). The "claim" is the claim that the defendant is not a career offender. *Id.* The "fact" supporting this claim is the fact that the prior state conviction, once used to support the assertion that the defendant was a career offender, no longer exists. *Id.* This "fact" was not "discoverable" until the date that the state conviction was conclusively invalidated. *Id.*

In contrast, the United States Court of Appeals for the First Circuit and Eleventh Circuit offer a starker

interpretation of 28 U.S.C. §2255 ¶6 (4). Particularly, in *Brackett*, the First Circuit held:

> We hold that the operative date under §2255(4) [sic] is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction.

Brackett v. United States, 270 F.3d at 68. Similarly, in *Johnson*, the Court held:

> Because an indirect collateral attack is predicated on a successful challenge to prior state convictions used to enhance the federal sentence, it is at least plausible to argue that a petitioner has one year from the date his prior state convictions were set aside, under §2255 ¶6 (4).
>
> Common sense, however, dictates that we distinguish legal propositions and results from the "facts" referred to in §2255.

Johnson v. United States, 340 F.3d at 1233. The *Johnson* Court went further, characterizing the vacatur of a prior state conviction as a "court action" and not a "fact" that is "discoverable." *Id.*

But the apparent logic behind *Johnson* and *Brackett* utterly evades those defendants who relied on *Custis* and *Daniels*. Even the *Brackett* Court acknowledged the predicament now facing such defendants:

> ...the net result of Custis and Daniels was to leave federal prisoners in a practical bind. They could not bring a §2255 petition to federal court until they had gotten the state convictions vacated and they had only one year in which to accomplish that from the date of federal conviction - - a daunting task.

Brackett v. United States, 270 F.3d at 67. "It would be an illogical, if not cruel, gesture for the Supreme Court to invite prisoners to attack their predicate convictions and then inform them that their efforts must go for naught and their enhanced sentences must stand." *United States v. Payne*, 894 F. Supp. 534, 543 (D. Mass. 1995). To avoid a miscarriage of jurisprudence and justice, the Court should grant Certiorari and protect those defendants who have reasonably relied upon the procedure set forth by the United States Supreme Court.

Moreover, it is no answer that the defendant should have initiated his collateral attack on the state court conviction earlier. In Georgia, for example, the defendant could not initiate his state habeas petition until he was laboring under a new federal sentence that was increased based on his prior state conviction. There simply would have been no jurisdiction to challenge an older (already-served) state conviction until its effect is again realized: that is, the conviction is causing a longer sentence in federal court. *See Capote v. Ray*, 276 Ga. 1, 577 S.E.2d 755 (2002); *Moss v. State*, 255 Ga. App. 107, 564 S.E.2d 516 (2002); *Parris v. State*, 232 Ga. 687, 208 S.E.2d 493 (1974). Thus, Johnson pursued his state collateral challenge in a

timely manner – as soon as he had jurisdiction in state court, based on the enhanced federal sentence.[3]

D. UNLESS THE COURT REVERSES THE LOWER COURT, FEDERAL PRISONERS WILL RECEIVE ENHANCED SENTENCES, EVEN LIFE SENTENCES, BASED ON PRIOR STATE CONVICTIONS WHICH THEY DID NOT COMMIT OR WHICH WERE UNCONSTITUTIONALLY OBTAINED.

Other courts have rejected the interpretation of 28 U.S.C. §2255 ¶6(4) as enunciated by the First and Eleventh Circuit and, instead, followed the interpretation announced in *United States v. Gadsen, supra. See United States v. Hicks*, 286 F. Supp.2d. 768 (E.D. La. 2003); *Duran v. United States*, 2002 WL 867864 (S.D.N.Y 2002); *United States v. Hoskie*, 144 F. Supp.2d 108 (D. Conn. 2001); *United States v. Cavallaro*, 2000 WL 230225 (D. Me. 2000). In doing so, these courts have avoided a regime in which federal prisoners serve substantially longer sentences, even life sentences, based on a prior state conviction that was subsequently vacated. As Judge Roney stated in his dissent in *Johnson, supra:*

> Without question, if the rule announced in this decision and in Brackett is consistently applied, in some circuits there will be defendants serving time in federal prison under a federal sentence based upon conviction of a state crime that the state court

[3] It should be noted that in 2004, the Georgia Legislature amended the state habeas statute, and implemented a four-year statute of limitations for challenging a felony conviction. O.C.G.A. § 9-14-42. Johnson, however, filed his state habeas action in a timely manner under then-existing state law.

> has authoritatively held the defendant unquestionably did not commit, who would be barred from relief, while in other circuits relief from such imprisonment will be readily available.

This inequity should not be reduced to law; and the Court can provide the needed relief by reversing the decision of the Eleventh Circuit in this case.

E. THE INTERPRETATION OF 28 U.S.C. §2255 ¶6(4) IN *BRACKETT* AND *JOHNSON*, IF ALLOWED TO STAND, WILL CAUSE THOUSANDS OF MERITLESS SECTION 2255 MOTIONS TO DELUGE FEDERAL COURTS.

Human cost aside, the decisions in *Johnson* and *Brackett*, if allowed to stand, will cause a deluge of meritless § 2255 motions undoubtedly generating unnecessary work for clerks, judges and their support staff, and federal prosecutors. The reason is simple: To comply with the one year limitations period, federal prisoners will have to file Section 2255 motions while the collateral attacks on their prior state convictions are still pending. For federal practitioners, prudence and the fear of ineffective claims would require erring on the side of filing such a motion promptly after sentencing. Predicting these problems, the district court in *Brackett v. United States*, 206 F.Supp.2d 183, 186 (D. Mass. 2002), explained:

> Thus, rather than have failure in the state court act as a natural screen, the courts' approach results in thousands of meritless petitions being filed--each of which requires a case file be opened, orders issued, papers docketed, and the file stored. ... The net result

> is that the burden on the courts imposed by habeas corpus petitions is likely to increase, not decrease, as the courts continue to wrestle with AEDPA.

To prevent an unnecessary burden to the federal judiciary, the Court should adopt the Fourth Circuit's interpretation of 28 U.S.C. §2255 ¶6(4).

CONCLUSION

Amicus Curiae respectfully request the Court to reverse the decision of the Eleventh Circuit. The issue presented here is critically important to an unknown number of federal inmates, to any number of future defendants, to all federal practitioners, and to the federal judicial system itself.

Respectfully submitted,

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